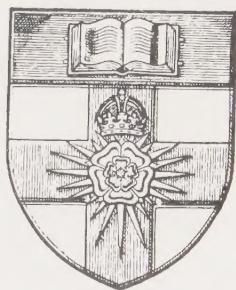


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THE
CRIMINAL APPEAL REPORTS

WITH
SUBJECT INDEX, TABLES OF CASES AND
STATUTES CITED

OCTOBER 15, 1946, TO MAY 25, 1948

EDITED BY
T. R. FITZWALTER BUTLER,
OF THE INNER TEMPLE AND MIDLAND CIRCUIT, BARRISTER-AT-LAW, RECORDER OF NEWARK

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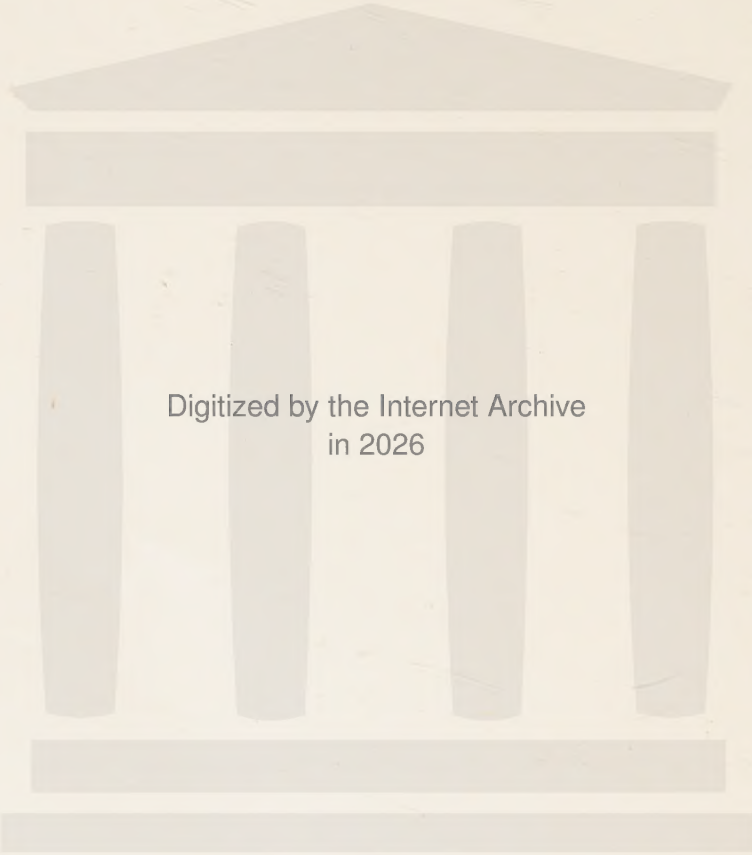
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BEFORE
THE LORD CHIEF JUSTICE, MR. JUSTICE LYNSEY AND
MR. JUSTICE SELLERS.

RICHARD HORNBY.
HECTOR MAURICE PEAPLE.

1946.
Oct. 15.

Summing-up—Gross Indecency—Necessity of Two Men Acting in Concert—No Physical Contact—Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), s. 11.

On a charge of gross indecency between male persons, the jury should be directed that it must be established that there was an act of gross indecency by the one prisoner with the other and that the two prisoners were acting in concert.

Semble, where two male persons are acting in concert to behave in a grossly indecent manner, the offence may be established even though there has been no actual physical contact.

Appeals against conviction.

The appellants were charged at Wiltshire Quarter Sessions on July 2, 1946, with committing an act of gross indecency with each other, and were convicted on this charge. They were also charged with attempted buggery, of which they were acquitted. They were sentenced, Hornby to twelve months' and Peaple to six months' imprisonment.

The evidence called for the prosecution is that of a police officer, who said that he had found the appellants in close proximity and in a compromising position, Hornby having his person and Peaple his anus exposed, in a public lavatory, coupled with certain statements made by the respective appellants. The appellants gave evidence, each blaming the other and each denying that he himself had been a consenting party to any indecency.

Raymond Stock, for the appellant Hornby :

The conviction was unsatisfactory, as if the jury accepted the evidence of the police officer the logical conclusion would

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have been to convict both appellants of attempted buggery, yet they acquitted on this charge. Further, to constitute the offence of gross indecency between male persons, actual physical contact is essential, and the jury were never given any direction on the ingredients of this offence.

R. W. Vick, for the appellant Peaple, adopted the above argument.

Claude Grundy, for the Crown :

Physical contact is not necessary to constitute the offence of gross indecency; an agreement whereby two male persons behave in a grossly indecent manner is sufficient. The jury may have acquitted on the charge of attempted buggery because they felt in some doubt whether there was any act sufficiently proximate to the full offence to constitute the attempt. It is conceded that there was no explanation to the jury of the ingredients of the offence of gross indecency, but this was unnecessary as the language of the statute speaks for itself.

Raymond Stock replied.

LYNSKEY, J. (after stating the facts): The Chairman left it to the jury whether they would convict either of attempted buggery or of gross indecency. In this class of case it is quite to be understood that a Judge, having regard to the feelings of the jury and other people in Court, is rather apt to pass over the full details of the evidence, but it is necessary that the essence of each charge should be explained in detail to the jury.

On this occasion the Chairman started his summing-up by telling the jury: "These two men, Richard Hornby and Hector Maurice Peaple, have been charged today with two offences. The first offence is gross indecency, and the second offence is attempted buggery". He went on to tell the jury: "As regards the second count, attempted buggery, there it is a matter for you to consider whether you believe the story of the constable. If you believe his story, then you have to consider whether the attitude in which he found these men

was consistent with an attempt at buggery. . . . As regards the gross indecency, if you consider that the actual attitude in which these men were found did not go so far, one might say, as attempted buggery, then you have to consider the second charge, whether an act of gross indecency was committed in this lavatory ”.

On that summing-up the jury found the two appellants not guilty of attempted buggery, but guilty of gross indecency. The argument before us on behalf of the Crown has been that there was evidence which would justify a jury in finding a verdict of gross indecency, and that there was an adequate direction on that count. We have had an argument whether actual physical touching is essential to constitute the offence of gross indecency by one male person with another. In my view, it is not necessary to decide that question in this particular case. If I had to decide it, I personally would take the view that, if two male persons are acting in concert to behave in an indecent manner, there may be gross indecency the one with the other, even though there is no actual physical contact. In this case, the difficulty which we feel in supporting the convictions is that the Chairman nowhere directed the jury that they had to find that the two men were acting in concert—that they were each committing an act, or being a party to an act, of gross indecency the one with the other. In the first part of the summing-up he refers to the count as one of gross indecency. In the second part of the summing-up, dealing with the same matter, he simply leaves it to the jury in the terms which I have just read. In view of the fact that there was a denial by each of the men that he was a party to the act of the other, and that from the evidence of the police constable the inference might have been drawn that they were acting in concert, it was essential, in our opinion, that the jury should be directed on this point. They ought to have been told that the act of gross indecency must be by one person with the other and that the two men must have been acting in concert. They might have been directed that they

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could draw the inference that the two men were so acting from the facts proved by the constable, if they accepted his evidence and rejected the evidence of the two defendants, but they were not so directed, and in the absence of that direction this Court feels that it cannot say that, if the jury had been properly directed, they would inevitably have come to the same conclusion and found the two defendants guilty of gross indecency. In those circumstances the appeals will be allowed and the convictions quashed.

Convictions quashed.

Solicitors: Pennington & Son, for Lemon, Humphreys & Parker, Swindon, for appellant Hornby; Wansbroughs & Co., Devizes, for the Crown.

BEFORE
THE LORD CHIEF JUSTICE, MR. JUSTICE LYNSKEY AND
MR. JUSTICE SELLERS.

EDWIN EASTERLING.

1946.
Oct. 15.

*Quarter Sessions—Sentence—Postponed till Next Sessions—Practice
Not to be Followed in Absence of Special Reasons.*

It is undesirable that Courts of quarter sessions (other than London and Middlesex Sessions) should postpone sentence and remand a prisoner in custody till the next sessions, unless there is some good reason for doing so, as, for example, an offer by the prisoner to make restitution in respect of stolen property or to give information.

Appeal against conviction.

The appellant was convicted at West Kent Quarter Sessions on July 12, 1946, of receiving stolen property. Sentence was postponed by the Chairman till the following sessions, but pending the hearing of appeal the appellant was released on bail by order of Denning, J.

H. Boileau, for the appellant.

Graham Dow, for the Crown.

THE LORD CHIEF JUSTICE (after stating that in the opinion of the Court the conviction must be quashed): Before parting with the case, we desire to refer to one other matter. The appellant was tried on July 12 and when he and his co-defendants were found guilty, the Chairman remanded them all in custody until the next sessions for sentence. Why he took that course nowhere appears. I have no doubt that, if there had been no appeal, when the prisoners came up for sentence at the next sessions, the Court would have taken into account the fact that they had been waiting seven weeks in custody before sentence. This Court, however, cannot approve of the practice of postponing sentence and keeping

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a prisoner in custody, unless there is something to be gained by it, where that is done at ordinary Courts of quarter sessions. By ordinary Courts I mean the Courts which are held in most counties of England four times a year, and I do not include the London Sessions, which are practically continuous, or even the Middlesex Sessions, which are very frequent. It may be that on conviction a prisoner will offer to take steps to restore stolen property or to give some information. The Court might then say that that was a good reason for postponing sentence and that they would see what happened between those sessions and the next sessions. They might say : " The sentence which we shall pass in this case will in any event be more than six weeks or three months, and therefore no great harm will be done if we order the prisoner to be kept in custody and see what happens, because we can take the time that he has been in custody into account when we pass sentence ". But as a general rule, unless there is some reason, this Court cannot think that the practice is a desirable one for Courts of quarter sessions to adopt. In the present case it does not appear that there was any particular reason, as we have not had any report from the Chairman as to why he took the course which he did.

Conviction quashed.

Solicitors: Bennett, Welch & Co., for appellant; Solicitor to Metropolitan Police, for the Crown.

IN THE HOUSE OF LORDS.

BEFORE

VISCOUNT SIMON, LORD THANKERTON,
LORD MACMILLAN, LORD WRIGHT, LORD PORTER,
LORD SIMONDS AND LORD DU PARCQ.

HENRY WILLIAM WICKS.

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*Emergency Legislation—Defence Regulation made under Statute—
Doing Acts Likely to Assist Enemy—Prosecution after Expiry
of Statute—Validity—Emergency Powers (Defence) Act, 1939
(2 & 3 Geo. 6, c. 62), s. 11—Defence (General) Regulations,
1939 (S. R. & O., 1939, No. 927), reg. 2A.*

The appellant was convicted of doing acts likely to assist the enemy, contrary to regulation 2A of the Defence (General) Regulations, 1939, which regulations were made under the Emergency Powers (Defence) Act, 1939. The acts charged in the indictment were all committed between April, 1943, and January, 1944. The Act of 1939 expired on February 24, 1946. The appellant was arrested on March 3, 1946, and convicted on May 28, 1946. By section 11 (1) of the Act of 1939, provision is made for the expiry of the Act "subject to the provisions of this Act". By section 11 (3): "the expiry of this Act shall not affect the operation thereof as respects things previously done or omitted to be done".

Held, that the wording of section 11 (3) made it clear that that subsection was not intended to expire with the rest of the Act, and that the right to prosecute after the expiry of the Act for acts done before its expiry was thereby preserved, even though the prosecution and conviction took place after its expiry. The appellant was, therefore, rightly convicted.

Appeal by the prisoner from an order of the Court of Criminal Appeal dismissing his appeal against conviction.

The appellant was convicted at the Central Criminal Court on May 28, 1946, on a number of counts in an indictment each charging him with doing an act likely to assist the enemy, contrary to Regulation 2A of the Defence (General) Regulations, 1939, and s. 3 (b) of the Emergency Powers (Defence)

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Act, 1939, and was sentenced by Croom-Johnson, J., to four years' penal servitude.

The acts charged in the indictment were all committed between April, 1943, and January, 1944. The Emergency Powers (Defence) Act, 1939, which empowered the Defence (General) Regulations to be made, expired on February 24, 1946. The appellant was arrested on March 31, 1946, and his trial took place on May 27 and 28, 1946. He defended himself and no point was taken at the trial on the validity of the prosecution. The appellant appealed to the Court of Criminal Appeal and the hearing took place on October 21 and 22, 1946.

Melford Stevenson, K.C., and Sir John Cameron, for the appellant:

It is submitted that no prosecution could validly be brought against the appellant after the regulation on which it was founded had expired. The only provision in the Emergency Powers (Defence) Act, 1939, which deals with the situation which is to arise on the expiry of the Act is section 11 (3), and its language is not sufficiently wide to justify the institution and continuation of a prosecution under a statute or regulation which expired before the commencement of the prosecution. There is a clear distinction between the repeal and the expiry of a statute and the distinction was discussed by Avory, J., in *BENNETT v. TATTON* (1918), 34 T. L. R. 591. The position which arises on the repeal of a statute is dealt with by section 38 (2) of the Interpretation Act, 1889, under which, unless the contrary intention appears, the repeal is not to affect the matters there set out. The fact that expiring legislation is left without any such provision was referred to by Roche, J., in *SPENCER v. HOOTON* (1920), 37 T. L. R. 280, at p. 281. Section 11 (3) does not assist the Crown in this case—first, because the sub-section itself expired with the Act, and secondly, because its language is not apt to refer to the commencement of a criminal prosecution after the expiry of the Act.

[SINGLETON, J. : What do you say that the sub-section was meant to achieve?]

It may have been intended to protect executive or ministerial acts done under the statute or regulations—acts which, at the time when they were done, were protected.

[LYNSKEY, J. : It appears that, to justify such an interpretation you would have to add the word “thereunder” at the end of the sub-section.]

Reliance is placed also on the decision of this Court in CHAPMAN, 23 Cr. App. R. 63; [1931] 2 K. B. 606, which decided that, where equivocal words in an Act of Parliament leave a reasonable doubt about their meaning, the doubt must be resolved in favour of the subject.

The Solicitor-General (Sir Frank Soskice, K.C.), Gerald Howard and John Bass, for the Crown :

The effect of the authorities is that, where a statute has been repealed, the position is as if it had never been enacted except in respect of matters done and concluded before the repeal. The position on expiry is, however, different. In that case the particular statute must be considered to see whether it is intended that it should be in force for any—and if so, for what—purposes after expiry. In this particular case the wording of section 11 (3) is quite general and as wide as possible, and is apt to include under the head of a “thing done” an offence committed before the expiry of the statute. The only question which has to be asked is how the thing would have operated before expiry, and the question is answered by saying that certain penal consequences would have followed, and this remained the position. If the construction proper to be placed on the regulations is that a person can be prosecuted to conviction under them only if proceedings are taken before their expiry, their effect would be weakened, as anyone who had good reason to believe that their expiry was at hand could commit an offence with impunity in the belief that he could not be proceeded against after their expiry.

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Melford Stevenson, K.C., in reply :

The main contention of the Crown appears to be that section 11 (3) of the Act of 1939 keeps alive the Act sufficiently for it to operate on a chain of events which started before the expiry of the Act so long as those events are causally connected, but in view of the numerous regulations made under the Act such a contention would render any clear or certain construction of the Act impossible. *Cur. adv. vult.*

Nov. 4.—The following judgment of the Court (THE LORD CHIEF JUSTICE, SINGLETON, DENNING, LYNKEY and SELLERS, JJ.) was read :

THE LORD CHIEF JUSTICE : The judgment which I am about to read represents the unanimous opinion of the Court.

The appellant was convicted at the Central Criminal Court before Croom-Johnson, J., on an indictment containing nine counts charging him with doing acts likely to assist the enemy, with intent to assist the enemy, contrary to Regulation 2A of the Defence (General) Regulations, and section 3 (b) of the Emergency Powers (Defence) Act, 1939. It is from this latter Act that the Defence Regulations derived their validity. That Act, by section 1 (1), empowers His Majesty by Order in Council to make such regulations as appear to him to be necessary or expedient for securing the public safety, the defence of the realm, the maintenance of public order and the efficient prosecution of any war in which His Majesty may be engaged. It was passed on August 24, 1939, and by section 11 (1) it was provided that " Subject to the provisions of this section, this Act shall continue in force for the period of one year " (afterwards extended to two years by the Emergency Powers (Defence) Act, 1940), " and shall then expire ". It was further provided that " if at any time while this Act is in force, an address is presented to His Majesty by each House of Parliament praying that this Act should be continued in force for a further period of one year from the time at which it would otherwise expire, His Majesty may by Order in Council direct that this Act shall continue in force for that

further period". By various Orders in Council issued under the authority of this proviso the Act was continued in force until August 24, 1945, and on June 15, 1945, the Emergency Powers (Defence) Act, 1945 (8 & 9 Geo. 6, c. 31), was passed, substituting for sub-section (1) of section 11 in the Act of 1939, a sub-section which reads: "Subject to the provisions of this section this Act shall continue in force until the expiration of the period of six months beginning with the twenty-fourth day of August, nineteen hundred and forty-five, and shall then expire". There was the same proviso for a further extension as was contained in the principal Act, but no further Order in Council was issued, and accordingly, on February 24, 1946, the Act expired.

The acts which the indictment charged the prisoner with doing as likely to assist the enemy were all committed between April, 1943, and January, 1944, and his trial took place on May 27 and 28, 1946. At the trial the prisoner elected to defend himself without the assistance of counsel. Consequently it is perhaps not surprising that the point with which this Court has now to deal, and which is of a highly technical nature, was not taken at the trial, and the learned Judge was not asked to rule upon it. Subsequently an application was made to this Court for leave to appeal by Sir John Cameron on the appellant's behalf on a variety of grounds, but the only one in which there was any substance was whether the prisoner could be tried and convicted of an offence against an Act which had expired before the date of his conviction. This point being one of law, he was entitled to appeal as of right.

It will be observed that section 11 (1) is prefaced by the words "Subject to the provisions of this section", and by sub-section (3) it is provided that "the expiry of this Act shall not affect the operation thereof as respects things previously done or omitted to be done", and the question which this Court has to decide is whether these words authorise the prosecution and conviction of the prisoner notwithstanding the expiration of the Act. The question is one of some difficulty,

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and the Court has had the advantage of very full argument on both sides in which all the relevant authorities have been brought to their attention. The first observation which the Court would make is that they are in complete agreement with the decision of the Divisional Court in *WILLINGALE v. NORRIS*, [1909] 1 K. B. 57, that where a statute enables an authority to make regulations, a regulation made under the Act becomes for the purpose of obedience or disobedience a provision of the Act. The regulation is only the machinery by which Parliament has determined whether certain things shall or shall not be done. It is therefore clear that the regulations must be read as though they were contained in the Act itself. They derive their efficacy solely from the Act and accordingly expire with the Act, but it may be that the Legislature has provided that some restrictions or consequences shall remain effective notwithstanding the expiration of the Act. Considering the position first at common law as to the expiration or repeal of a statute, in our opinion the position may be taken as now settled. The leading authority is *STEAVENSON v. OLIVER* (1841), 8 M. & W. 234. In that case, Parke, B., said (at p. 241): "There is a difference between temporary statutes and statutes which are repealed; the latter (except so far as they relate to transactions already completed under them) become as if they had never existed; but with respect to the former, the extent of the restrictions imposed, and the duration of the provisions, are matters of construction". That passage was considered and approved by Roche, J., as he then was, in *SPENCER v. HOOTON* (1920), 37 T. L. R. 280, and in our opinion is a correct statement of the law. It is worth observing that in *STEAVENSON v. OLIVER* (*supra*), there are *dicta* both by the Chief Baron and by Alderson, B., which go further, and appear to say that in any case where a man offends against a temporary statute he can be convicted and punished after its expiration, but in our opinion this is contrary to the older cases which were not cited to the learned Judges, in particular, *MILLER'S CASE*

(1764), 1 W. Bl. 451, and McKENZIE (1820), Russ. & Ry. 429. At the present day it is most unlikely that any question of this nature will arise where an Act has been repealed, because the position is sufficiently dealt with by section 38 (2) (c) and (d) of the Interpretation Act, 1889, which provides that the repeal of an Act passed after the commencement of this Act shall not, unless the contrary intention appears, affect any liability incurred, or affect any penalty or punishment incurred in respect of any offence committed against any enactment so repealed, and the section goes on to provide that any legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act had not been passed. This section, however, has no application to statutes which have expired, and the question must therefore remain one of construction whether the provisions as to expiry are such as to make it impossible for a prosecution or other proceeding to be either instituted or brought to conviction, or whether on a true construction of the Act Parliament has provided that legal proceedings, whether of a civil or criminal character, can be prosecuted in relation to matters connected with the Act after it has expired. In the present case, but for the provision in sub-section (3) of section 11, it could, we think, hardly be contended that a person could be convicted for an offence against the Act after its expiration, and accordingly, as we have already said, the whole question is the construction which ought to be placed on sub-section (3) of section 11.

For the appellant it is argued that the words of that sub-section are insufficient to carry the consequences that would have ensued had the section contained some such provision as is contained in section 38 of the Interpretation Act, or if that section had been made to apply to the expiration as it would have done had the Act been repealed, and that the sub-section must be read as referring only to things done and completed while the Act was in force. The Crown, on the

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other hand, contends that from its terms it is clear as a matter of construction that Parliament did not intend the sub-section to expire with the rest of the Act, as otherwise it would be meaningless. The Court can therefore, it is said, look at the sub-section and not treat it as expunged from the Statute Book, and if it finds that an act has been done or omitted to be done before the Act expired, it must allow the Act to operate in respect of that act or omission. It is always presumed that Parliament knows the state of the law at the time when it is legislating; it must also, we think, be presumed that Parliament knows what words are considered apt to effect a particular result. Bearing in mind the length of time that the Interpretation Act has been on the Statute Book, it is certainly true to say that if the Legislature intended the result contended for by the Crown, it has used somewhat elliptical words. Nevertheless, statutes are not usually expressed in terms of art as that expression would be understood by a conveyancer, and if effect can be given by a short clause to what in another Act is achieved by language more comprehensive, there is no reason why this should not be done. If the intention appears, effect to it must be given by the Court.

Now if this sub-section operates only on matters past and completed, it may well be asked what object there was in enacting it at all. A competent authority or administrator under the Act would not require it for his protection after the Act had expired, provided what had been done or omitted thereunder was authorised by the Act at the time of the act or omission. To take an example, if after the expiration an action of trespass either to the person or to property was brought against an officer of the Crown alleging detention without trial or the taking of possession of land against the will of the owner, he could plead that at the time he did the act complained of, it was justified by the law then in force. Accordingly, we do not think that we ought to construe the sub-section as one inserted merely *ex majore cautela*; while, no doubt, it does cover completed acts or transactions, we

think the language is wide enough to make the provisions of the Act apply, or in the language of the section to operate, in respect of any act done before the expiration even though not perfected or completed till afterwards. Regulation 2A refers to an act and Regulation 2B (2) refers to an omission. If, therefore, it is proved that before the expiration of the Act a person did an act likely to assist the enemy with intent, or omitted to do that which it was his duty to do in respect of matters dealt with in Regulation 2B, in our opinion the Act is to operate notwithstanding its expiry, and it operates by making the act or omission an offence for which the offender is liable to be convicted.

A formidable argument, however, was advanced on behalf of the appellant based upon subsequent legislation respecting the Act and Regulations. On June 15, 1945, the Emergency Powers (Defence) Act, 1945 (8 & 9 Geo. 6, c. 31) was passed, to which we have already referred. That continued the Act of 1939 in force for a period of six months from August 24, so that it was to expire on February 24, 1946, but this was still subject to the provisions of section 11 and, therefore, also to sub-section (3). On December 10, 1945, there was passed the Supplies and Services (Transitional Powers) Act, 1945 (9 Geo. 6, c. 10). This Act gave power to direct that certain of the Regulations should have effect although they were not for the time being necessary for the purposes specified in section 1 (1) of the Act of 1939, and gave power with regard to making further Defence Regulations for the control of prices. This Act is to expire after five years, but it is expressly provided that section 38 of the Interpretation Act shall apply on the expiry of the Act as if it had been repealed. Then, on February 14, 1946, only ten days before the Act of 1939 was due to expire, there was passed the Emergency Powers (Transitional Provisions) Act, 1946. This contains elaborate provisions for maintaining in force certain specified Regulations, of which 2A is not one; it deals with the manner of instituting proceedings for offences against such Regulations as

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are continued, and section 1 (3) applies section 38 of the Interpretation Act to any Regulation on its expiry as if it were an Act of Parliament and had been repealed.

Thus it will be seen that in these Acts far more elaborate provisions have been made as to their expiry than are contained in the sub-section of the 1939 Act which we are considering. It is a sound rule of construction that "when there are different statutes *in pari materia* though made at different times or even expired and not referring to each other, they shall be taken and construed together as one system and as explanatory of each other"—*per* Lord Mansfield, C.J., in *LOXDALE* (1758), 1 Burr. 445, at p. 447, followed by the Court of Appeal in *GOLD-SMITHS' CO. v. WYATT* (1907), 76 L.J.K.B. 169. Conversely, if the Legislature uses different words in several statutes, *prima facie* the inference is that a different meaning is intended—*per* Bayley, J., in *EAST TEIGNMOUTH INHABITANTS* (1830), 1 B. & Ad. 244 at p. 249. But that is not to say that because more precise or more elaborate language is used in a later Act the language of a former Act, elliptical though it be, is not to receive its ordinary meaning. Had the words of the sub-section been "The expiry of this Act shall not affect anything previously done or omitted to be done thereunder", there would have been greater, it may be irresistible, force in the appellant's contention. Such words would indicate no more than a confirmation of acts or a ratification of or excuse for omissions that had already taken place. Here, however, the provision is that the Act is to operate after its expiry as respects previous acts or omissions. On turning to Part III of the First Schedule to the Act of 1946, it will be noticed that exactly the same words are used with reference to each of the Regulations mentioned therein, and the only difference is that section 11 (3) of the Act of 1939 is general and Part III of the 1946 Act is specific. It is clear that Parliament intends that the Regulations should continue to operate in respect of the matters referred to as though they had not expired.

As we have already said, the statute operates on an act

previously done with intent to assist the enemy by making it an offence punishable with penal servitude. In our opinion, therefore, we are bound to construe the sub-section as meaning that the expiration of the Act is not to affect the liability or punishment incurred under the enactment or the prosecution of legal proceedings for the purpose of inflicting that punishment. It may be that it follows from this construction that had any particular Regulation been annulled by resolution of either House of Parliament as provided by section 8 (2), a person would nevertheless remain liable to punishment for anything done contrary to the Regulation before its annulment, as similar words appear in that sub-section. Though this situation can never now occur, it was submitted that such a result would be so unreasonable that Parliament cannot have intended it. The answer to that contention appears to be that section 8 (2) does not render a Regulation in respect of which Parliament passes such a resolution void *ab initio*, but only that it shall cease to have effect when the resolution is passed. The words are: "The order shall *thereupon* cease to have effect". No doubt if it were clear that Parliament had disapproved of the making of the order on the ground that it was one which ought never to have been made, it is hardly likely that any authority would prosecute for a breach of the order. If they did, the effect of annulment could and probably would be reflected in the penalty that the Court would impose.

But it might be that the Regulation was passed to deal with a state of circumstances which had ceased to exist when Parliament came to consider it. Had Parliament been in recess when the Regulation was made, a considerable time might elapse before it could be considered. In such a case we do not see that there would be anything unreasonable in a person being punished for a breach of the law which was in existence at the time he offended, though Parliament had put an end to it by the time the prosecution was launched.

A further argument which was pressed upon the Court was that, where there is ambiguity or doubt as to the meaning

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of a statute which the canons of construction fail to solve, the matter should be resolved in favour of the subject and against the Legislature which has failed to explain itself.

This is a well-known doctrine and has been applied in more than one case, but though a problem may prove difficult it by no means follows that the result is either doubtful or ambiguous. Courts and juries exist for the purpose, among other things, of solving difficulties both of law and of fact, and were it to be said that if the solution is difficult the result must be doubtful, their task would indeed in many cases be far easier than it is.

In our opinion, giving the words of the sub-section their natural meaning, there is neither doubt nor ambiguity, and the result would appear to be both just and reasonable. The appeal is accordingly dismissed. The sentence will run from the date of conviction.

The appellant appealed, by fiat of the Solicitor-General, to the House of Lords. The appeal was heard on December 12, 1946.

Section 38 (2) (c) and (d) of the Interpretation Act, 1889, enacts that the repeal of an Act passed after the commencement of the Act of 1889 shall not, unless the contrary intention appears, affect any liability incurred or affect any penalty or punishment incurred in respect of any offence committed against any enactment so repealed, and the section goes on to provide that any legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing Act had not been passed.

Melford Stevenson, K.C., and Sir John Cameron, for the appellant.

The Solicitor-General (Sir Frank Soskice, K.C.), Gerald Howard and John Bass, for the Crown.

The arguments for the appellant were substantially similar to those in the Court of Criminal Appeal. Counsel for the Crown were not called on to argue.

VISCOUNT SIMON: My Lords, the Solicitor-General, in the exercise of the discretion which is vested in him under the Law Officers Act, 1944, when the Attorney-General is not available, has certified that the decision, dated November 4, 1946, of the Court of Criminal Appeal in this matter involves a point of law of exceptional public importance and that, in his opinion, it is desirable in the public interest that a further appeal should be brought. Accordingly, the House is called on to deal with the appeal.

Having heard the arguments for the appellant, I have formed the clear conclusion that the decision of the Court of Criminal Appeal is right and that the appeal should be dismissed. The point involved can be stated in very few words. The appellant, who is a British subject, was convicted at the Central Criminal Court before Croom-Johnson, J., sitting with a jury, on an indictment containing a number of counts charging him with doing acts (such as entering the service of an enemy broadcasting station and preparing propaganda for enemy broadcasts) at various dates between April, 1943, and January, 1944—acts which were “likely to assist the enemy”, and were done “with intent to assist the enemy”, contrary to Regulation 2A of the Defence (General) Regulations, 1939, as applied to British subjects abroad by section 3 (1) (b) of the Emergency Powers (Defence) Act, 1939.

There is no doubt that, when a statute like the Emergency Powers (Defence) Act, 1939, enables an authority to make regulations, a regulation validly made under the Act—that is, which is *intra vires* of the regulation-making authority—should be regarded as though it were itself an enactment. As the Court of Criminal Appeal in its judgment has pointed out, that was decided by the Divisional Court in *WILLINGALE v. NORRIS*, [1909] 1 K. B. 57, and it appears to me that that decision is perfectly correct. Consequently, the charge against the appellant here was, in effect, that he had committed crimes defined or contained in the Act of Parliament.

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At the date when these acts were committed the Regulation to which I have referred was in force, and if the appellant had been prosecuted immediately afterwards—he may not have been in England at that time, but if he had been prosecuted immediately afterwards—then the validity of his conviction could not be open to any challenge at all. But the Act of 1939 was a temporary Act, and after various extensions it expired on February 24, 1946. The trial of the accused, however, only took place in May, 1946, and he was convicted and sentenced to four years' penal servitude on the 28th of that month.

The question raised by the appeal, therefore, is simply this: Is a man entitled to be acquitted when he is proved to have broken a Defence Regulation at a time when that Regulation was in operation because his trial and conviction take place after the Regulation has expired? As was pointed out in the course of the argument, to which we have closely listened, very strange results would follow if that were so. Supposing the case were one in which a man broke the Regulation a week or two before it expired, then, on the argument of the appellant, as those appearing for him have quite frankly admitted, he could never be punished, unless, indeed, the trial was carried to the point of conviction before the Regulation itself expired. One could put a more extreme case: the authorities may have been so prompt as to start the prosecution before the Regulation had expired, but if the trial were not over, then, at the very moment when the Regulation expired, the trial would necessarily cease and the man would go free. In so far as one is entitled to consider the reasonableness of the contentions put forward by the appellant, obviously those results would be far from reasonable. But the question is not, or at any rate not mainly, whether such a result would be reasonable, or such as one should expect; the question is a pure question of the interpretation of sub-section (3) of section 11 of the Emergency Powers (Defence) Act, 1939. I need not read

it, because we have gone through it, with the help of counsel, very carefully.

It is pointed out that the Interpretation Act, 1889, does not apply to the case of a statute, or a Regulation which has the power of a statute, when it expires by effluxion of time. The section in the Interpretation Act is addressed to Acts which have been repealed, and not to Acts which expire owing to their purely temporary validity. It is, I apprehend, with this distinction in mind, which is quite well known, and certainly quite well known to the authorities who frame statutes, that the draftsman inserted the words used in section 11. Section 11 begins with the words "Subject to the provisions of this section", and those introductory words are enough to warn anybody that the provision which is following immediately is not absolute, but is going to be qualified in some way by what follows. It is therefore not the case that, at the date chosen, the Act expires in every sense; there is a qualification. Without discussing whether the intermediate words are qualifications, sub-section (3), in my opinion, is quite plainly a qualification. It begins with the phrase, "The expiry of this Act"—a noun which corresponds with the verb "expire"—"The expiry of this Act shall not affect the operation thereof as respects things previously done or omitted to be done". Counsel for the appellant have therefore been driven to argue ingeniously, but to admit candidly, that the contention which they are putting forward is that the phrase "things previously done" does not cover offences previously committed. I think that view cannot be correct. It is clear that Parliament did not intend sub-section (3) to expire with the rest of the Act, and that its presence in the statute is a provision which preserves the right to prosecute after the date of expiry. This destroys the validity of the appellant's argument altogether.

The Court of Criminal Appeal, after a most careful examination of the whole matter, came to this conclusion

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—I am quoting the words of the Lord Chief Justice (*ante*, p. 18): “In our opinion, giving the words of the sub-section their natural meaning, there is neither doubt nor ambiguity, and the result would appear to be both just and reasonable”. I think that your Lordships unanimously agree with the conclusion of the Court of Criminal Appeal, and I therefore move the House that this appeal be dismissed.

LORD THANKERTON: My Lords, I concur in the speech which has just been delivered by my noble and learned friend on the Woolsack. I would like to add that the intention of Parliament is not to be judged by what is in its mind, but by its expression of that mind in the statute itself. The question here arises on the construction of sub-section (3) of section 11 of the Act of 1939. As regards the proper construction of that statutory provision I have found no difficulty, and I will only add that I agree with the words of the Lord Chief Justice: “Giving the words of the sub-section their natural meaning, there is neither doubt nor ambiguity”.

LORD MACMILLAN: My Lords, I also agree.

LORD WRIGHT: My Lords, I also agree, and have nothing to add.

LORD PORTER: My Lords, I concur.

LORD SIMONDS: My Lords, I also concur.

LORD DU PARCQ: My Lords, I concur.

Appeal dismissed.

Solicitors: Ludlow & Co., for appellant.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS
AND MR. JUSTICE LEWIS.

KENNETH LESLIE MILLS.

JOHN LEMON.

1946.
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*Evidence—Confession—Verbal Précis of Confederate's Statement
Given to Prisoner by Police—Confession Intelligible without
Introducing Question Giving Rise to it—Admissibility—Judges'
Rules, r. 8.*

By rule 8 of the Judges' Rules: "Where two or more persons are charged with the same offence and statements are taken separately from the persons charged, the police should not read those statements to the other persons charged, but each of such persons should be furnished by the police with a copy of such statements and nothing should be done or said by the police to invite a reply. If the person charged desires to make a statement in reply, the usual caution should be administered".

Contrary to the above rule, a police officer gave to two persons who were suspected of being implicated in an offence a verbal précis of what a confederate, who was in custody, had said. Both persons then made statements, each of which amounted to a complete confession of guilt.

Held, that despite the contravention of the above rule, as each confession was intelligible in itself without the introduction of the statement by the police officer which had preceded the making of it, the confessions were admissible in evidence.

GARDNER AND HANCOX (1915), 85 L. J. K. B. 206, followed.

Appeals against conviction.

The appellants were convicted at Bristol Quarter Sessions on October 16, 1946, of larceny, and were sentenced by the Recorder, Lemon to 12 months' and Mills to nine months' imprisonment. The case against them was that they, together with an American soldier named West, stole money from a man who had gone to the bank to collect wages. West was arrested and made a statement to the police which implicated both the appellants. The appellant Lemon was later arrested,

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and the appellant Mills went voluntarily to the police station. They were interviewed separately, and the officer in charge of the case gave each of them a verbal précis of West's statement. The appellant Lemon was asked if he wished to make a statement, and said that he would think it over. Soon afterwards he said that he would like to write out his own account, and then wrote out a clear confession. Later, the appellant Mills, who also was asked if he wished to make a statement, dictated a full confession. At the trial objection was taken to the admissibility of each of these confessions, but the Recorder overruled the objection and held that each was admissible.

Cyril Lavington, for the appellant Mills :

The conduct of the police officer was in breach of rule 8 of the Judges' Rules. He should merely have shown West's statement to the appellant, without inviting any comment on it. It was quite wrong to give the appellant instead a verbal précis and to invite him to comment thereon. The police officer's evidence with regard to what West had said was clearly inadmissible, and it is contended that the appellant's confession which followed thereon was inadmissible, too, or at least, the Recorder should in his discretion have excluded it.

P. J. Bate, for the appellant Lemon, adopted the same argument.

Claude Grundy, for the Crown, was not called on to argue.

THE LORD CHIEF JUSTICE: It is contended that the confessions were obtained in a manner contrary to rule 8 of what are commonly called the "Judges' Rules". It is to be observed that the Bristol police did not observe this rule which has been laid down for their guidance, and the sooner they study and learn these rules and abide by them the better. [His Lordship read the rule and continued:] If, therefore, the police had handed both the appellants the statement which West had made and left them to decide whether they would make statements or not, the rule would have been complied

with and no objection could have been taken. However, they gave the appellants a précis of West's statement and then asked them if they wished to make a reply. That they should not have done.

The question then arises whether the statements which the appellants did make were inadmissible in evidence. What lies at the root of rule 8 of the Judges' Rules is this: There used to be a practice by which the police would give evidence before the jury to the following effect: "I saw the prisoner. I told him that John Smith had been arrested and had said 'Yes, I was there and he [the prisoner] was with me'". Then the prisoner made a statement and said, perhaps, that he was not there at all, but that was a means of getting before the jury the statement of John Smith. John Smith was not called as a witness, and, therefore, his statement could not have been given in evidence, and it was wrong that it should be indirectly given in evidence in Court by the device of saying: "I told the prisoner that John Smith had said such-and-such a thing. I asked him whether he wanted to say anything in answer, and this was his answer". The position remains that, if the answer which the prisoner gave is not intelligible without the question being given in evidence before the jury, and the question is properly ruled out, the answer must be ruled out too. On the other hand, if the prisoner chooses to write out or dictate a full confession, there is no authority which says that, if the answer is intelligible without the question which gave rise to it, when the question is excluded, the confession, too, must be excluded. Indeed, so to hold would be contrary to the decision of this Court in *GARDNER AND HANCOX* (1915), 85 L. J. K. B. 206. Rule 8 of the Judges' Rules was framed after that case, and it will be observed that that rule nowhere states that the answer which is given is not to be admissible, although, if it can only be intelligible by introducing the question, both question and answer must be ruled out. In the present case the police should have supplied a copy of West's statement to the appellants, so that they should

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have the necessary information and no objection could have been taken. There is, however, the clearest possible authority in *GARDNER AND HANCOX (supra)* that, although the way in which the police have acted may be objectionable, these confessions cannot be excluded as inadmissible. In our opinion, they were clearly admissible. The appellants had made a full confession of the part which they had taken in the affair, and the Recorder quite properly would not allow the police to give evidence of the circumstances which had preceded the making of the confession, because that would have enabled them to say: "West says you were with him when he committed the offence". That is excluded, but the confessions which the appellants wrote out were intelligible without it, and consequently the confessions were properly before the jury, with the inevitable result that the jury convicted, and rightly convicted, both the appellants. The appeals fail and must be dismissed.

Appeals dismissed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS
AND MR. JUSTICE LEWIS.

JOHN WILLIAM COLLINS.

1947.
Jan. 14.

*Sentence—Outstanding Charge—Offence under Road Traffic Acts
—When Not Proper to be Taken into Consideration.*

Offences under the Road Traffic Acts, which involve or may involve on conviction disqualification from driving or endorsement of licence, are not cases proper to be taken into consideration when a prisoner is being sentenced for a different class of offence.

Application for leave to appeal against conviction.

The applicant was convicted at the Central Criminal Court on October 15, 1946, on two charges of receiving stolen property and was sentenced by the Recorder of London to three years' penal servitude, one outstanding offence of driving a motor car when under the influence of drink being taken into consideration.

No counsel appeared on either side.

THE LORD CHIEF JUSTICE [after stating that in the opinion of the Court the application should be refused]: One matter has arisen in this case on which it is desirable to say something of which I hope notice will be taken. After the prisoner had been convicted, the officer in charge of the case quite properly informed the Recorder that there was a warrant out against the prisoner for driving a motor car whilst under the influence of drink. The Recorder then asked the prisoner if he desired that that offence should be taken into consideration. The prisoner said that he did so desire, and the Recorder said that he would do so. In the opinion of this Court, offences under the Road Traffic Acts, which involve, or may involve on conviction, disqualification from

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driving, or the endorsement of the licence, are not cases proper to be taken into account when a prisoner is being sentenced for an entirely different class of offence. No doubt if a prisoner is charged on indictment with an offence under the Road Traffic Act for which he is liable to be disqualified, and there is a second similar charge against him, the Court might take that into account. The reason why such offences ought not otherwise to be taken into consideration is this, that unless there is a conviction, for instance, for driving when under the influence of drink or driving when uninsured, there is no power to disqualify the prisoner from holding a licence, and Parliament has ordained that unless special circumstances exist the prisoner must in some cases be disqualified, and in other cases his licence must be endorsed. That is a matter with which the Divisional Court recently dealt at some length in *WHITTALL v. KIRBY*, [1947] K. B. 194. In this particular case I daresay no harm was done, but none the less, if the case had been inquired into, the Court might have considered that a period of disqualification for five or ten years or, if the appellant had been convicted two or three times before, for life, might have been appropriate. Again, if a sentence of six months' hard labour were passed in a particular case, it would be most unsatisfactory that a case of driving under the influence of drink should be taken into consideration, because the period of disqualification must be a year. This Court, therefore, lays it down that for the future offences under the Road Traffic Acts for which disqualification or endorsement of the licence must follow in the absence of special reasons to the contrary are not cases proper to be taken into account when sentence is being passed for dishonesty or some other different class of offence.

Application refused.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS
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WALTER GRAHAM ROWLAND.

1947.
Jan. 27;
Feb. 10, 17.

*Further Evidence—Murder—Alleged Confession by Another Person
—Refusal of Court to Hear Evidence—Matter More Appropriate
for Investigation by Home Secretary.*

Refusal by the Court, on appeal against conviction of murder, to give leave to the appellant to call as a witness a person serving a sentence of imprisonment who, subsequent to the conviction of the appellant, had made an alleged confession of the murder, the matter being deemed more appropriate for investigation by the Home Secretary.

MASON (1923), 17 Cr. App. R. 160, referred to.

Appeal against conviction, and application for leave to call further evidence.

The appellant was convicted at Manchester Assizes on December 16, 1946, of murder, and was sentenced by Sellers, J., to death.

At the trial the appellant had brought forward the defence of an alibi. He obtained leave to call, on the hearing of the appeal, two witnesses whose evidence was not available to the defence at the trial. The Court refused leave to call a third witness, who had been interviewed by the appellant's solicitor before the trial, and also refused leave to call a fourth witness named Ware, who while serving a sentence of imprisonment had, subsequent to the appellant's conviction, made an alleged confession of the murder.

Kenneth Burke and H. Openshaw, for the appellant.

Basil Nield, K.C., and B. Wingate-Saul, for the Crown.

When the appeal originally came on for hearing on January 27, 1947, the Court, on being asked to grant leave to call further evidence, adjourned the hearing of the appeal for

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a fortnight. On February 10 they heard the two witnesses and refused to grant leave to call the other two witnesses above referred to, and dismissed the appeal, but stated that they would give their reasons at a later date.

February 17.—The judgment of the Court was read by HUMPHREYS, J. : The appellant was convicted on December 16, 1946, at Manchester Assizes, of the murder of Olive Balchin. The body of the deceased, a woman of loose morals, staying in Manchester, was found in a bombed site at the corner of Cumberland Street and Deansgate, Manchester, on the morning of Sunday, October 20, 1946. Death was due to laceration of the brain, the result of repeated blows with a blunt instrument. A yard from the body was found a leather dresser's hammer which, according to medical evidence, might have been and no doubt was the weapon used by the murderer.

The principal evidence against the appellant was furnished by three independent witnesses : (1) A licensed broker named MacDonald, with a shop at 3 Downing Street, Ardwick, proved that the hammer in question had been sold by him at about 5.40 on the afternoon of Saturday, October 19, to a man who had seen it in the window and bought it, although he was told by MacDonald that it was useless for ordinary purposes such as driving in nails. The man had observed that it would serve his purpose and had taken it away wrapped in crepe paper. The paper was also found near the body. MacDonald identified the appellant at an identification parade on October 27 as the purchaser. (2) Mrs. Copley, a waitress at the Queen's Cafe, just off Deansgate, proved that the deceased woman with another woman and a man were in the cafe on the evening of the 19th, the man carrying a thin parcel about a foot long. The party left about 11 p.m. Mrs. Copley picked out the appellant at an identification parade on October 27 as the man accompanying the two women. (3) Norman Mercer, licensee of the Dog and Partridge Inn, Deansgate, proved that about midnight on the 19th he was taking his dog for a run and at the corner of Deansgate and Cumberland Street he saw a man

and a woman arguing and apparently quarrelling. He noticed them as he passed because it was unusual to see anyone at that place at that hour. He returned past the same spot half-an-hour later but both man and woman had disappeared. Mercer later identified the body of the deceased as that of the woman and picked out the appellant as the man in question at an identification parade.

Those three identifications by three separate persons quite unknown to each other were considerably strengthened by statements and admissions made by the appellant when interviewed by the police on October 26. He said that he had known Olive Balchin as "Lil" for some weeks and had sexual connection with her on two occasions, that he had met her on Friday the 18th in Manchester and made up his mind to try to find out whether she was responsible for the V.D. from which he was suffering, and added: "Before I left her I said I would see her the following night". He at first denied being in Manchester on Saturday evening, but corrected that, saying: "I did come back to Manchester. I got a lift in a car and then went to a pub for a drink. I did not go into Deansgate. I stayed in the Ardwick district, had a bit of supper and stayed at Grafton House in Hyde Road. I did not get in until after one o'clock". On being told that inquiries would be made at Grafton House, he replied: "I did not stay there, but at 36 Hyde Road. I was there for one night". It was proved at the trial that he did stay one night at 36 Hyde Road, but it was the night of Sunday the 20th. The appellant's final statement to the police as to his movements on the night of Saturday the 19th was to the effect that he had gone home to his mother's house at Temple Mills, about thirteen miles from the centre of Manchester, had there changed his clothes, had then gone by bus to Stockport, arriving there about 10, had some drinks in the Wellington public house, got on a bus to Manchester, but got off at Ardwick and stayed at 36 Hyde Road in that district the rest of the night.

At the trial his defence was an alibi supported by a witness

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named Beaumont, the keeper of a lodging-house at 81 Brunswick Street, Chorlton-on-Medlock, who was called to say that the appellant arrived at his house about 11.15 p.m. on Saturday the 19th, stayed the night there and left on Sunday morning the 20th between 9 and 10 o'clock. It was perhaps unfortunate that Mr. Beaumont should have made an error in his Visitor's Book in entering the date of the appellant's departure as the 19th instead of the 20th, but that was a matter for the jury. There was other evidence for the defence called to establish the visit of the appellant to Stockport. What view the jury formed as to that we do not know, but that evidence, if accepted to the fullest extent, only put the appellant in Mercer Square, Stockport, at 10.30 p.m. at the latest. If the appellant's statement: "I did come back to Manchester. I got a lift in a car" is accepted, he could easily have been at Deansgate at 10.45 and so may be the man referred to by Mrs. Copley, while if his later story to the effect that he returned from Stockport in a bus is true, he could not have arrived at the Queen's Cafe before 11 o'clock. Those considerations were of course referred to by counsel and by the learned Judge in his summing-up and were essentially matters for the jury, who convicted the appellant.

On the hearing of the appeal, no complaint was made by counsel for the appellant as to the conduct of the trial or of the summing-up of the learned Judge, but this Court was asked to hear four fresh witnesses. In accordance with the usual practice, permission was given to call two of those witnesses, named Somerville and Ellwood, whose evidence was not available to the defence at the trial. Their evidence merely confirmed the other evidence as to the presence of the appellant in the Wellington public house up to 10.30 p.m., and in our view would certainly not have affected the minds of the jury. Permission to call Ann Coppock, wife of the licensee of the Wellington Hotel, to the same effect was refused upon the Court being informed by counsel for the appellant that the solicitor for the appellant had interviewed the witness before the trial, and having learned what evidence she could give, that it was decided by counsel not to call her. The rule is an old one, has

often been stated and was referred to with approval by a Court consisting of Lord Alverstone, C.J., Avory and Salter, JJ., as far back as 1920 in *WEISZ*, 15 Cr. App. R. 85, the headnote of which runs as follows: "The Court will not hear a witness whom the appellant deliberately declined to call at the trial".

The fourth witness whom the Court was asked to hear was David John Ware. The Court was informed that Ware, while a prisoner serving a sentence in His Majesty's Prison, Liverpool, had on January 24, 1947, made a statement confessing to the murder of which Rowland had been convicted on December 16, 1946. Ware had been in Liverpool Prison awaiting trial from October 23, 1946, to January 15, 1947, when he was sentenced to nine months' imprisonment. As an unconvicted person, he would during that time have had free access to the daily newspapers. No one will doubt that such a statement calls for the most careful investigation. Our reason for refusing the application to hear the evidence of Ware was that we were satisfied that the Court of Criminal Appeal is not the proper tribunal to hold such an inquiry. It is no light matter to reverse the finding of a jury who have convicted a person of murder after a trial extending over five days in which twenty-eight witnesses were called. It is obvious that the mere statement of a person such as Ware that the convicted man is innocent because he himself is guilty, even if made on oath, would not justify quashing the conviction of that other person, but would only be the beginning of an inquiry which would involve, in the light of the new evidence, the recalling of many witnesses and probably the calling of several fresh ones. The Court would certainly require to hear the evidence of the three identifying witnesses after they had been given the opportunity of seeing Ware; it would probably think it necessary to learn the views of the medical witnesses upon certain aspects of the matter. The prosecution might well ask for leave to call other witnesses to trace the movements of Ware or to give other evidence with a view to showing that no jury would be likely to accept his story as true. Such an inquiry would be of a totally different character from the simple

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issue involved in the calling of a fresh witness to speak to some fact connected with the defence put forward at the trial. For instance, the two fresh witnesses whose evidence we heard were called to corroborate the appellant's evidence that he was in Stockport up to 10.30 p.m. on October 19.

If we had allowed Ware to give evidence before us, and he had persisted in his confession of guilt, the Court would have been compelled to form some conclusion as to his guilt or innocence and to express that opinion in open Court. In effect, therefore, the Court would have been engaged in trying not only Rowland but also Ware, and thereby usurping the function of a jury. It is true that we should not be empowered to pronounce finally upon the issue of the guilt or innocence of Ware, who as the result of our judgment might have to stand his trial by jury on this charge of murder. In that event the finding of this Court could not fail to be prejudicial to his chance of an impartial trial.

Now this Court has in truth no power to try anyone upon any charge. It is not a tribunal of fact but a Court of Appeal constituted by statute to examine into the proceedings of inferior Courts in certain cases of conviction on indictment. We have no power even to direct a new trial by a jury; much less have we the right to conduct one ourselves.

The attitude of the Court towards the question of hearing fresh evidence has often been stated. For instance, in *MASON* (1923), 17 Cr. App. R. 160, where Mason had been convicted of murder and the leave of the Court was asked for several fresh witnesses to be called in support of his appeal, Darling, J., giving the judgment of the Court refusing leave, observed, after dealing with the facts, as follows (at p. 161): "It is now really asked that there should be a new trial which this Court is not empowered to order and that we should hear certain witnesses and then consider the whole of the trial in the light of that new evidence. This Court exercises with very great caution the power given to it to hear fresh evidence because to do so

is opposed to the old-established, trusted and cherished institution of trial by jury. This Court has to be convinced of very exceptional circumstances before it will reconsider the verdict of a jury in the light of fresh evidence". We find no exceptional circumstances in the present case. Upon the hearing of the appeal we were not referred to, and we are not ourselves aware of, any precedent for granting the present application.

Finally, we are not unmindful of the fact that there exists an authority in the person of the Home Secretary, who has far wider powers than those possessed by this Court, who is not bound as we are by rules of evidence, and who has all the necessary machinery for conducting such an inquiry as is here asked for.

We found no legal ground for interfering with the verdict of the jury, and accordingly dismissed the appeal.

Appeal dismissed.

NOTE.—Under the direction of the Home Secretary, an inquiry was held by Mr. J. C. Jolly, K.C., on February 21, 22 and 23, at which Ware retracted his confession. Mr. Jolly reported that he was satisfied that Ware was speaking the truth when he said that he did not commit the murder. Subsequently Rowland was executed.

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BEFORE
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THOMAS ELLIOTT.

1947.
Feb. 24.

Sentence—Offences in Connection with Post Office Savings Bank Books.

Observations to the effect that penal servitude is generally to be regarded as the appropriate punishment for offences in connection with Post Office savings bank books.

Appeal against sentence.

The appellant pleaded guilty at Manchester Assizes on November 26, 1946, to two charges of obtaining money from H.M. Postmaster-General by means of a forged withdrawal. He was sentenced by Sellers, J., to twenty-one months' imprisonment, sixteen similar offences being taken into consideration.

A. A. Gordon Clark, for the appellant.

No counsel appeared for the Crown.

The material facts appear fully in the judgment.

THE LORD CHIEF JUSTICE: For reasons which will appear in a moment I hope it may be possible for some publicity to be given to this case. It is a class of case which is, unfortunately, only too common at the present time.

The appellant pleaded guilty before Sellers, J., at the last Assizes at Manchester to obtaining money from the Post Office by means of a forged withdrawal. The circumstances of the case were that he went to stay with a friend. While he was staying with the friend he broke open an attache case and then stole a Post Office savings bank book which belonged to his friend and also a book of clothing coupons which he afterwards used to identify himself as the person owning the savings

bank book. Armed with that clothing coupon book and the Post Office savings bank book, he went to a post office in Manchester and succeeded in obtaining on demand the withdrawal of £10. Now it is well known in these days, and criminals are taking full advantage of the fact, that it is possible, by producing a Post Office savings bank book, to obtain a withdrawal on demand of £3 in the ordinary case, and I understand in circumstances which show some exceptional or some very good reason, a withdrawal up to £10. That is what the appellant did in the first place. On the occasion which formed the subject-matter of the second indictment he gave notice that he wished to withdraw the sum of £30 by a telegraphic withdrawal, which is another facility which is given. The telegram was sent, for which he paid the fee, and on that occasion he withdrew £30. Those were the two counts in the indictment, but there were sixteen other cases in which he had withdrawn money, and towards the end of that series of cases he again went to the same post office. A warning by this time had been circulated against him and he was arrested.

There were, therefore, eighteen cases in which the appellant drew money from the Post Office, and the total amount that he succeeded in obtaining was £145, of which only £12 has been recovered. For that series of offences he received the very lenient sentence of twenty-one months' imprisonment, and against that sentence he applied for leave to appeal. The only reason why he obtained leave to appeal was because the Court considered that it was a case in which they ought to consider very carefully whether they would not substantially increase the sentence. Never a sitting of this Court goes by without one or two of these cases, and these are only a very small proportion of the large number of cases of this particular class of fraud which is being carried on by people at post offices all over England. The result of it may be the withdrawal of this facility of withdrawing money on demand, which is being abused in this way, to the detriment of honest people who have got Post Office savings bank accounts and to whom it is a great convenience at times, when they want money in a hurry,

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to be able by production of their books to withdraw these small amounts. This Court thinks that it is well that all Courts should know, and that all persons who are minded to commit this type of offence should know, that for this offence penal servitude is the appropriate sentence. We are finding now that this class of offence is rife, and that people who are dishonestly minded are discovering that they can by plausible excuses persuade the Post Office to pay out money after either forging the book by increasing the credits therein or, as in this case, stealing another person's book together with some proof of identity. It is just as well that they should understand that penal servitude, unless there are some wholly exceptional circumstances, is the proper punishment for this class of case. It has got to be stopped.

The only excuse of the appellant in this case is that he had had some domestic trouble. How does that justify a man going round post offices in the country, drawing other people's money and imposing the loss on the taxpayer, as this man has done? It was in last November that the appellant was sentenced, and since that date this Court has on more than one occasion refused to interfere with a sentence of penal servitude in this class of case. The Court has had serious doubts whether it ought not to increase this sentence to one of three years' or four years' penal servitude, but considering the fact that this case was tried last November, and it is since then that we have given a warning in other cases, and in view of the fact that the appellant's character hitherto has been without reproach and he has done good service in the Army, the Court has come to the conclusion that in all the circumstances of the case it will err on the side of mercy and will not increase his sentence. It is perfectly ridiculous to suppose the sentence could be reduced.

The appeal is dismissed and the sentence will date from today and not from the date of conviction.

Appeal dismissed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CASSELS AND
MR. JUSTICE HALLETT.

FREDERICK WILLIAM REYNOLDS

1947.
10 March.*Murder—Summing-up—Duty of Counsel for Appellant.*

Observations on the duty of counsel appearing for the appellant on an appeal against conviction of murder, where the summing-up is not open to criticism.

Appeal against conviction.

The appellant was convicted at the Central Criminal Court on February 4, 1947, of murder and was sentenced by Atkinson, J., to death.

A. A. Gordon Clark, for the appellant.

Anthony Hawke, for the Crown.

THE LORD CHIEF JUSTICE (after stating that in the opinion of the Court there was no possible defence to the charge): I fully appreciate the difficulties with which counsel who are instructed for murderers who put in a notice of appeal are often faced, and I do not want to say one word which would be thought to reflect in any way on Mr. Clark, who has put forward the only points which could be put. I desire, however, to repeat what I have said before, that there is no duty of counsel merely because he is asked to represent an appellant against a conviction of murder to attack a summing-up which is quite impeccable and which has put the case fairly and properly to the jury. There is no obligation on counsel in such a case to endeavour to find some minute points which could have no bearing on the case. The Court has always read the transcript of the case, and when it is perfectly clear that there is no ground for appeal, there is no duty on counsel

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other than to tell the Court that he represents the appellant, and that if the Court has discovered anything in the case on which they wish to hear him, he is prepared to do his best to assist the Court.

In this case, Atkinson, J., who tried the case with meticulous care, delivered a full, ample and fair summing-up in which the law is stated to the jury as accurately as any learned Judge could state it and the evidence is put before them as fairly as any Judge could put it. The summing-up was almost more than fair to the prisoner, and in a long summing-up, as this was, there can nearly always be found some phrase or other in which the Judge may have used some verbal inaccuracy which by no conceivable possibility could have any effect on the case at all. In an appeal of this kind, because it is an appeal against a conviction of murder, counsel very often thinks that he is bound to try to attack the summing-up where there is no real attack to be made and where nothing has been said to the jury which could possibly mislead them. Where there is nothing in the summing-up which in any way misstates the law, there is no duty on counsel to go through the summing-up with what I may call a magnifying glass to see if some verbal inaccuracy can be found or if some point which has been mentioned in the course of the case has not been mentioned to the jury.

In this particular case, from first to last, there was not a shadow of a defence. It was as deliberate and wicked a murder as can well be conceived, and the appeal is dismissed.

Appeal dismissed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CASSELS AND
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ARTHUR BERTRAM FRANKS.*

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Sentence—Borstal Detention—Committal to Quarter Sessions or Assizes—Duty of Committing Justices to Avoid Delay—Criminal Justice Administration Act, 1914 (4 & 5 Geo. 5, c. 58), s. 10, as amended by Criminal Justice Act, 1925 (15 & 16 Geo. 5, c. 86), s. 46.

Where justices have decided to commit a young offender to quarter sessions or assizes for sentence under section 10 of the Criminal Justice Administration Act, 1914, s. 10, as amended by section 46 of the Criminal Justice Act, 1925, with a view to his being sentenced to Borstal detention, if the quarter sessions for the county or borough to which the offender would normally be committed are not to be held for some time, they should commit to the appropriate assizes instead, if this course will secure the more expeditious disposal of the case.

Application for leave to appeal against sentence.

The applicant was convicted before a petty sessional court on October 14, 1946, of larceny of fowls, and was committed for sentence under section 10 of the Criminal Justice Administration Act, 1914, to Northamptonshire Quarter Sessions. On January 2, 1947, he was sentenced to 3 years' detention in a Borstal institution.

No counsel appeared.

THE LORD CHIEF JUSTICE: This is rather a special case and I think it deserves some notice with regard to the proper course to be adopted when justices are sending young offenders to

* The judgment in this case must now be regarded as having been revised by the judgment in *YEOMANS* (*post* p. 75) and reference should be made to the later report when the report of this case is read.

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quarter sessions with a view to their being there sentenced to Borstal detention.

The applicant, who has by no means an unblemished record, but who comes from a respectable home, his father being a railway servant, broke into a fowlhouse with another boy and stole a few fowls. The applicant was just over 17 years of age. He was sentenced in 1942 to 28 days in a remand home for shopbreaking and larceny. Then, after being employed in numerous jobs, none of which he kept for more than six months, on February 19, 1946, he was fined £12 10s. for five larcenies, three of which were really cases of shopbreaking. His reason for stealing again in the present case was that he had to pay the fine out of his earnings. He had been making payments, but then fell out of work, and stole to get some money to make further payments.

It is to be observed that the applicant had never been placed on probation, and it would have been better if he had been placed on probation instead of being sent for 28 days to a remand home or being fined for the five larcenies. But one is perhaps not surprised that, when the charge of fowl-stealing came before the justices, they thought it was a proper case for Borstal detention, and accordingly they committed the applicant to quarter sessions for the Court to consider whether that sentence should be passed. The difficulty was this: he was convicted and committed by petty sessions on October 14, 1946, a week or two after quarter sessions had been held. The justices might have committed him to the assizes for the Judge to deal with.

The applicant was detained in custody until January 2, 1947, which was the date of the next quarter sessions. I suppose he was treated as an unconvicted prisoner, but in his case the difference would be very small, except that he would not be obliged to work, if he was unwilling to do so. Some unconvicted prisoners while awaiting trial can have a separate room and have food sent in, but the applicant could not have anything of that sort, and in fact the discipline to which he would be subjected would be very nearly the same

as in the case of a convicted prisoner. He was a convicted prisoner, but until January 2, 1947, he was awaiting sentence. On January 2, 1947, he was sentenced to 3 years' Borstal detention and, I expect after the approval of his father was obtained, he lodged an appeal to this Court. That means that this boy, for a not very serious offence, has been in prison for substantially 5 months, and in the opinion of the Court it would be oppressive to let the sentence stand. I am not in the least reflecting on the justices for having sent the case for the consideration of quarter sessions whether there should be an order for Borstal detention, and I am not in any way suggesting that quarter sessions were not justified in passing a sentence of Borstal detention, but we see what the result has been.

My brother Hallett calls my attention to the fact that section 10 of the Criminal Justice Administration Act, 1914, as amended by section 46 of the Criminal Justice Act, 1925, provides that justices can commit to assizes or quarter sessions, whichever may be most convenient, and in this case, considering that the Northampton Assizes are held at the end of October, it would obviously have been more convenient if there had been a committal to the assizes. If the justices could not have sent him to Northampton, they could have sent him to Leicester, which follows Northampton, or somewhere else. But it is most desirable that, where petty sessions are committing young offenders under section 10 of the Act of 1914, to be dealt with by quarter sessions, that every effort should be made to send the case to an adjoining Court which is to be held within a short time, if the quarter sessions for the county will not be held for some time. Sometimes this Court and the Judges on circuit have had to comment on the fact that cases are sent from adjoining counties when they should never have been sent at all. There has been considerable comment from time to time on the number of cases quite unnecessarily sent from Buckinghamshire to the Central Criminal Court. If accused persons are on bail, it is unnecessary to follow this course, unless there is some reason for the need of an early trial

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as, for instance, that a witness for the prosecution has to go abroad. But in a case such as the present, it is obviously undesirable, if by any means it can be avoided—and it could have been avoided in this case—to take a step which will prevent the young offender from being dealt with at quarter sessions till a considerable time after committal.

In the circumstances, the Court has come to the conclusion that they will not allow the Borstal sentence to stand because, as the applicant has now been in prison 5 months, we think he has been punished enough. In our opinion, this is obviously a case in which the applicant should be put on probation, and therefore the Court will direct that he be brought up on the next occasion when the Court is sitting, so that his recognisances can be taken.

Sentence varied.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY,
AND MR. JUSTICE HALLETT.

HENRY CHARLES VICTOR TURNER

1947.
17 March.*Sentence—Offences by Officers of Post Office.*

Observations on sentence in the case of an offence by an officer of the Post Office.

Application for leave to appeal against sentence.

The applicant pleaded guilty at the Central Criminal Court on January 7, 1947, to larceny of a postal packet, he being at the time of the offence an officer of the Post Office, and to stealing out of a postal packet in the course of transmission by post, and was sentenced by the Recorder of London to 15 months' imprisonment, one similar offence being taken into consideration.

Lloyd Davies, for the applicant.

No counsel appeared for the Crown.

HILBERY, J. : This applicant pleaded guilty at the Central Criminal Court before the learned Recorder to a charge of stealing a postal packet, he being at the time of the theft an officer of the Post Office, and to a charge of stealing out of a postal packet in the course of transmission by post, and he was sentenced to 15 months' imprisonment, one other offence being taken into consideration. He now, through his learned counsel, applies for leave to appeal against his sentence.

He was a regular servant of the Post Office; he was a Post Office mail porter. He was seen opening more than one parcel and examining the contents, apparently to see what was in the parcel and if it was worth his while to steal it. It is true he had previously been a man of good character, and that is

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how he came to be in the permanent service of the Post Office. but he was behaving at the time in a way which showed that he had given himself up to dishonest practices. It is a very serious thing indeed for Post Office servants to steal from postal packets. They are trusted servants working in a public service of the highest importance. Nobody can ever measure the harm, the loss and the suffering that is inflicted when servants of the Post Office dishonestly steal from packets which are entrusted to the postal authorities for carriage and delivery. I, too, have exactly the same recollection as my Lord, the Chief Justice, has. Not very long ago, whenever such a theft was traced to a Post Office servant and proved against him, the Court passed a sentence of 5 years' penal servitude. Then came a time when the Courts tended to be a little more lenient, and passed sentences of 3 years' penal servitude. Sentences in these cases have now become lighter. If a man is of good character, he gets as light a sentence as the applicant in this case, but it is not a day too much, and indeed the learned Recorder would have been justified in passing a much longer sentence. In the circumstances, the application is dismissed.

Application dismissed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE ATKINSON
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MICHAEL PATRICK PHILLIPS.

1947.
15 April.

*Bail—Housebreaking—Previous Convictions for Similar Offences—
Probability of Repetition of Offence.*

Observations on the undesirability of bail being granted by magistrates in cases of housebreaking, where there is a likelihood of the offence being repeated pending trial.

Application for leave to appeal against sentence.

The applicant pleaded guilty at Liverpool Assizes on January 29, 1947, to two charges of housebreaking and larceny and one charge of housebreaking with intent, and was sentenced by Singleton, J., to 4 years' penal servitude, ten similar offences being taken into consideration.

No counsel appeared.

ATKINSON, J. : The applicant was charged jointly with his younger brother and a man named Johnston. On November 28, 1946, he broke into the house of a Mr. Tatlow and stole £15 in cash and property worth about £30. The same day the applicant and Johnston broke into the house of a Mrs. Harrop and stole £2 7s. 6d. in cash and property of the total value of £70. On November 30, the applicant and his brother broke into the house of a Mrs. Carr, where they were surprised and arrested before they could steal anything. He was brought before the magistrates on the same day, the hearing was adjourned until January 14, 1947, and he was released on bail. Nine of the ten other offences which the Court was asked to take into consideration were committed

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while he was on bail, seven being committed before committal for trial and two on the very night of the day of the committal.

The applicant's record is not good. He is 23 years of age. In March, 1939, he was sent to an approved school for house-breaking and larceny. In November, 1941, he was sent to Borstal for four similar offences. He was released on February 3, 1943, after being there for fourteen months. In October, 1943, he received 3 months' for larceny, and in October, 1945, six months' for shopbreaking and larceny. In the case of a man with such a record, it is quite impossible to suggest that 4 years' penal servitude was an excessive punishment for 12 cases of housebreaking and larceny and one of housebreaking with intent, and therefore the application will be refused.

The Court feels very strongly that the applicant ought not to have been released on bail. In cases of felony, bail is discretionary, and the matters which ought to be taken into consideration include the nature of the accusation, the nature of the evidence in support of the accusation, and the severity of the punishment which conviction will entail. Some crimes are not at all likely to be repeated pending trial and in those cases there may be no objection to bail; but some are, and housebreaking particularly is a crime which will very probably be repeated if a prisoner is released on bail, especially in the case of a man who has a record for housebreaking such as the applicant had. It is an offence which can be committed with a considerable measure of safety to the person committing it. There were three charges against the applicant. With regard to one there was no defence and in the case of another he was actually arrested in the act. Yet in spite of all his previous convictions the applicant was given bail, not once but twice, first pending the hearing before the magistrates and again on committal for trial. To turn such a man loose on society until he had received his punishment for an undoubted offence, an offence which was not in dispute, was, in the view of the

Court, a very inadvisable step. They wish magistrates who release on bail young housebreakers, such as this applicant, to know that in nineteen cases out of twenty it is a mistake. The Court hopes that some publicity will be given to these observations, so that magistrates may know the views of the Court of Criminal Appeal.

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Application refused.



BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE ATKINSON,
AND MR. JUSTICE OLIVER.

REX GARRETT THOMAS.

1947.
28 April.

Emergency Legislation—Unlawfully Obtaining Rationed Food—Committal for Trial for Receiving Stolen Property—Indictment—Added Count—Whether Proceedings Instituted by Police Officer—Whether Offence Disclosed in Depositions—No Proof before Magistrates of Statutory Rule and Order—Administration of Justice (Miscellaneous Provisions) Act, 1933 (23 & 24 Geo. 5, c. 36), s. 2 (2).

The appellant was committed for trial on a charge of receiving stolen property consisting of a large quantity of rationed food. At the trial a count charging the unlawful obtaining of rationed food contrary to article 4 of the Food Rationing (General Provisions) Order, 1946, was added to the indictment. Objection was taken that the adding of the count was improper on the grounds (i) that the proceedings had not been instituted by a police officer, and accordingly regulation 93 of the Defence (General) Regulations, 1939, had not been complied with; (ii) that the offence was not disclosed in the depositions as required by section 2 (2) of the Administration of Justice (Miscellaneous Provisions) Act, 1933, in that the Statutory Rule and Order had not been produced before the magistrates.

Held, that (i) as a police officer had been bound over to prosecute on the charge of receiving and the same officer had preferred the charge under the Rationing Order, the requirements of regulation 93 of the Defence (General) Regulations had been sufficiently complied with; (ii) as before the magistrates a Food Enforcement Officer had given evidence that the articles of food found in the appellant's possession were rationed foods, the offence was sufficiently disclosed on the face of the depositions, even though the Statutory Rule and Order would ultimately have to be produced at the trial in order to justify a conviction. The count was, therefore, properly added.

Appeal against conviction and sentence (on certificate).

The appellant was convicted at Devizes Borough Quarter

Sessions on February 10, 1947, of unlawfully obtaining rationed food, contrary to article 4 of the Food Rationing (General Provisions) Order, 1946, and was sentenced by the Recorder to 3 years' Borstal detention.

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The appellant was committed for trial on a charge of receiving stolen property. In the indictment were included a count in respect of that charge, on which he was acquitted, and also a count in respect of the rationing offence. Before the magistrates a Food Enforcement Officer had given evidence that the articles of food found in the appellant's possession were rationed foods, and this appeared on the depositions. The Statutory Rule and Order creating the offence was not produced before the magistrates. Objection was taken on behalf of the defence to the inclusion of the count charging the offence against the Rationing Order, but the Recorder overruled the objection, but gave a certificate for appeal.

C. M. Lavington, for the appellant :

It was wrong to allow the count charging the rationing offence to be included in the indictment for two reasons. In the first place, this was an offence under an order made under the Defence (General) Regulations, and regulation 93 was not complied with, because the proceedings were not instituted by a police officer. They were in fact instituted by the clerk of the peace who signed the bill of indictment. *BEARDSLEY v. GIDDINGS*, [1904] 1 K. B. 847, is an authority for the proposition that the laying of the information constitutes the institution of proceedings. Secondly, as there had been no committal for trial by reason of the provisions of section 2 (2) of the Administration of Justice (Miscellaneous Provisions) Act, 1933, the count could be added only if it were "founded on facts or evidence disclosed in any examination or deposition taken before a justice". The rationing offence was not disclosed in the depositions, because in order to establish it it was necessary that the Statutory Rule and Order constituting the offence should be produced. This was done at the trial, but not before the justices, and therefore no complete offence was

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disclosed on the depositions, as additional evidence was necessary to establish it.

M. McGougan, for the Crown :

The addition of the second count was permissible under section 2 (2) of the Act of 1933, as the offence was disclosed in the depositions, by reason of the fact that an official of the Ministry of Food had been called before the examining justices and had given evidence that the goods in question were rationed goods.

THE LORD CHIEF JUSTICE : This appellant appeals against conviction before the learned Recorder of Devizes, where he was convicted on an indictment charging him with obtaining rationed food, contrary to article 4 of the Food Rationing (General Provisions) Order, 1946. The learned Recorder also, with the consent of the appellant, took into account a breach of recognisance.

The history of the case was this. The police had occasion to interview the appellant with regard to a motoring offence. On visiting his lodgings, the officer found a great many articles of rationed food. The quantity was such that there could have been no *bona fide* reason for the appellant having the goods in his possession, and he was, not unnaturally, charged with receiving stolen goods. He was committed for trial, and on his trial the learned Recorder quite properly advised the jury to acquit on that charge, because it was not possible to prove that the goods had been stolen. Meanwhile, at quarter sessions, a second count had been added to the indictment, which charged the prisoner with obtaining rationed food, contrary to article 4 of the Food Rationing (General Provisions) Order, 1946. Counsel for the prisoner then took two points, and both those points have been argued again in this Court. The first point was the contention that the proceedings had not been instituted by a police officer. In the opinion of the Court, that point fails for this reason. A police constable had been bound over to prosecute. It is true that he was bound over to prosecute on the charge of receiving, but, having been

bound over to prosecute on that charge, he preferred the second charge, namely the charge against the Rationing Order. In the opinion of the Court he was, therefore, the prosecutor on that charge, and it was preferred by him.

The second point is this. In the days before 1933, when a bill had to be preferred before and found by a grand jury, it was always by common law open to a prosecutor to prefer any bill that he chose, and it was for the grand jury to say whether the prisoner should be put on trial or not. The only limit put on that power was by the Vexatious Indictments Act, 1859, which, with regard to certain offences, made committal for trial necessary. When the grand jury was abolished in 1933, a provision was inserted in the statute which repealed the Vexatious Indictments Act, but still enabled a second count to be inserted in an indictment, although the accused person had been committed only on one charge, provided that the facts or evidence on which the charge was found appeared or were disclosed in any examination or deposition taken before the magistrates. The question, therefore, arises whether or not, in the depositions taken before the magistrates, the facts or evidence disclosed a rationing offence. The submission of Mr. Lavington was that, as the prosecution had not produced the actual Rationing Order before the magistrates, no offence was disclosed. But before the magistrates a Food Enforcement officer had given evidence that the articles of food found in the appellant's possession were rationed foods. That shows, therefore, on the face of the depositions, an offence, although the evidence, to justify a conviction, would have to be reinforced by the purely formal matter of producing the Statutory Rule and Order. If the magistrates themselves had dealt with the case without the order being produced, that might well have been a fatal objection, but the facts shown on the depositions taken before them do disclose that there was a rationing offence, although a further piece of evidence was required and was produced at the trial to complete the

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case for the prosecution. In the opinion of the Court, therefore, the adding of the second count to the indictment was justified, and this point also fails.

[His Lordship then proceeded to deal with the question of sentence, and concluded:] A young man who has been dealt with in the lenient way in which this appellant was dealt with by being placed on probation and who chooses to enter what is commonly called the "black market" deserves to be dealt with quite severely. In the circumstances the Court does not interfere in any way with the sentence which the learned Recorder passed. This appeal fails, and is dismissed.

Appeal dismissed.

Solicitors: Arthur Taylor & Co., for Titley, Long, Taylor & Denning, Bath, for the appellant; Town Clerk, Bath, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE ATKINSON,
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IRIS RUTH BALL.

1947.
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Sentence—Borstal Detention—Charge of Larceny Proved—No Conviction Recorded—Offender Discharged on Entering into Recognisance—Subsequent Breach of Recognisance—Conviction then Recorded for Original Offence—Sentence of One Day's Imprisonment and Committal to Quarter Sessions for Sentence—Evidence at Quarter Sessions of Offender's Associations prior to Original Offence—Validity of Proceedings—Probation of Offenders Act, 1907 (7 Edw. 7, c. 17), s. 6 (1)—Criminal Justice Administration Act, 1914 (4 & 5 Geo. 5, c. 58), s. 10—Criminal Justice Act, 1925 (15 & 16 Geo. 5, c. 86), s. 7 (4).

In June, 1946, the appellant appeared before a magistrate on a charge of larceny, to which she pleaded guilty, consenting to be dealt with summarily. The magistrate refrained from proceeding to conviction and discharged the offender, placing her on probation and including in the recognisance a condition with regard to residence. In January, 1947, she appeared before another magistrate in respect of a breach of the recognisance and, on the breach being proved, the magistrate recorded a conviction in respect of the original offence and made the following minute of adjudication: "One day. Probation order cancelled. Committed to Sessions on conviction for original offence. Recommended for Borstal". When the appellant appeared before quarter sessions for sentence, evidence was given of her association with prostitutes prior to June, 1946. Quarter sessions imposed a sentence of Borstal detention.

Held, that (i) the sentence of one day's imprisonment must be regarded as having been imposed in respect of the breach of recognisance, and as under section 7 (4) of the Criminal Justice Act, 1925, there was no power to impose a sentence of imprisonment, but only a fine not exceeding £10 in respect of such breach, the sentence of one day's imprisonment was technically wrong and could have been quashed on certiorari; (ii) the committal to quarter sessions for sentence remained

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valid despite the irregularity ; (iii) quarter sessions were entitled to take the whole history of the appellant into account when considering the appropriate sentence, and the evidence of her associations prior to June, 1946, was, therefore, properly before them. The sentence of Borstal detention, therefore, remained valid.

Appeal against sentence.

On June 19, 1946, the appellant appeared at the Clerkenwell Magistrate's Court on a charge of larceny. She consented to be dealt with summarily and pleaded guilty. The magistrate refrained from proceeding to conviction and bound the appellant over in the sum of £5 for 12 months, placing her under the care of the probation officer and including in the recognisance a condition of residence. Subsequently the appellant committed a breach of recognisance by not residing where directed, and was fined 10s. at the Leicester City Magistrates' Court. She again committed a similar breach and on January 8, 1947, was brought before a different magistrate at the Clerkenwell Magistrate's Court. On the breach being proved, the magistrate recorded a conviction in respect of the original offence of June, 1946, and made the following minute of adjudication : " One day. Probation order cancelled. Committed to Sessions on conviction for original offence. Recommended for Borstal ". On January 29, 1947, the appellant appeared before the County of London Sessions for sentence. Evidence was given that prior to June, 1946, the appellant had associated with prostitutes, and the Chairman passed sentence of 3 years' detention in a Borstal institution.

B. Noakes for the appellant.

J. H. Buzzard for the Crown.

THE LORD CHIEF JUSTICE : This case comes before the Court in this way. On June 19, 1946, this appellant was charged before Mr. Daniel Hopkin at Clerkenwell with stealing from 50 Argyle Street, two coats and other property valued at £10, contrary to section 13 of the Larceny Act. She consented to

be dealt with summarily, and the learned magistrate bound her over in the sum of £5 for 12 months, placing her under the care of the probation officer, and making it a condition that she should reside at Leicester, where her mother lived. In so doing the magistrate refrained from proceeding to conviction. The effect of the binding over was that if she broke her recognisance, she would have to come up again before the Court, who would then proceed to conviction without further proof of guilt. I mention this as part of the history, and because it has a bearing on what order this Court should finally make in her case. She committed a breach of that recognisance by not residing at Leicester; and was brought before the magistrates there, and fined the sum of 10s. She again committed a similar breach of recognisance, and on January 8, 1947, was brought up before a different magistrate at Clerkenwell, charged with a failure to observe the conditions of her recognisance, which she admitted. The minute of adjudication by the learned magistrate was: "One day"—which, of course, is a purely nominal sentence—"Probation order cancelled. Committed to Sessions on conviction for original offence. Recommended for Borstal". The recommendation for Borstal takes place under section 10 of the Criminal Justice Administration Act, 1914, which provides: "Where a person is summarily convicted of any offence for which the court has power to impose a sentence of imprisonment for one month or upwards without the option of a fine" and certain things appear, among others "it appears to the court that by reason of the offender's criminal habits or tendencies, or association with persons of bad character, it is expedient that he should be subject to detention . . . it shall be lawful for the court, in lieu of passing sentence, to commit the offender to prison until the next quarter sessions, and the court of quarter sessions shall inquire into the circumstances of the case, and if it appears to the court that the offender" is a fit subject, and so on, the Court can pass a sentence of Borstal detention.

Now a highly technical point was taken on behalf of the appellant. It is quite right that a technical point should be

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taken if it is available, and Mr. Noakes has called our attention to all the statutes dealing with it. It is provided in the Criminal Justice Act, 1925, s. 7 (4): "A court before which an offender is brought or appears under section 6 of the principal Act for failing to observe the conditions of his recognisance may, instead of sentencing him for the original offence under subsection (5) of that section or remanding him to custody or on bail under subsection (3) of that section, as the case may be, and without prejudice to the continuance in force of the probation order, impose on him in respect of such failure a penalty not exceeding £10".

Section 6 of the principal Act, the Probation of Offenders Act, 1907, provides that: "(1) If the court before which an offender is bound by his recognisance under this Act to appear for conviction or sentence, or any court of summary jurisdiction, is satisfied by information on oath that the offender has failed to observe any of the conditions of his recognisance, it may issue a warrant for his apprehension". Then it is provided that: "A court before which a person is bound by his recognisance to appear for conviction and sentence, on being satisfied that he has failed to observe any condition of his recognisance, may forthwith, without further proof of his guilt, convict and sentence him for the original offence". That was done in this case. On the appellant being brought before the Court on January 8, 1947, the magistrate then recorded the conviction for the original offence of which she had already been found guilty, but on which the other magistrate had refrained, as he was entitled to do, from proceeding to conviction. It is said that the vice of the second magistrate's order is that in imposing a penalty of one day's imprisonment, he must have imposed that penalty in respect of the original offence, because if he was imposing that penalty for failing to observe the terms of probation, he had only power to impose a fine. In the opinion of this Court, the imposition of one day's imprisonment was technically wrong, and that could have been quashed on certiorari, because the magistrate had no power to pass the

sentence of one day for a breach of recognisance, though he could have fined the appellant. But it is quite obvious to the Court that the magistrate, in imposing the sentence of one day, was imposing it not for the original offence, but for the failure to observe the condition of recognisance. So far as the original offence is concerned, he thereupon convicted her, and sent her to the sessions for sentence. We think he was entitled to convict her and send her to the sessions for sentence, although he ought not technically to have imposed a penalty of one day's imprisonment for failure to observe the conditions of the recognisance. He could have fined her £10, which would have been a useless thing to do in the case of the appellant. He need not, however, have recorded any sentence for the failure to observe the condition. He could simply have recorded the conviction, and sent her straight to quarter sessions without recording any sentence. No harm has been done to the appellant, because she has not served the sentence of one day; she has been detained in prison under the provisions of the Act which enables the magistrate to send her to quarter sessions with a view to a sentence to Borstal detention being passed there. The Act then provides for committal to prison during the time which elapses between appearance before the magistrate and the holding of the sessions.

There is nothing, we think, wrong in the sessions having dealt with this case. They were in a position to pass a sentence of Borstal detention, if the other circumstances of the case justified Borstal detention. Clearly, in the appellant's own interests, Borstal detention is the satisfactory way of dealing with this case, if the conditions in the statute are satisfied. When she came before the court of quarter sessions, it could be shown that at any time she had been an associate of prostitutes or living a life of prostitution. It may well be that when she was before Mr. Daniel Hopkin in June, 1946, he would not, merely on the ground she was associating with prostitutes before that date, have been able to send her to sessions for sentence; but once she has been properly sent to sessions, the sessions can take the whole of her history into

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account. As association with persons of bad character is one of the things a court of quarter sessions can take into account when considering whether Borstal detention is proper, it was quite proper to call evidence to show that before her conviction in 1946 she had been an associate of prostitutes. She subsequently showed herself to be a thoroughly naughty girl, because she has had to be dealt with at Leicester for a breach of recognisance, and the fine which was there imposed had no effect on her. She still persistently refused to perform the conditions of the recognisance, and quarter sessions thought it was a proper case for Borstal detention. So does this Court, and accordingly this application, which we have treated as an appeal, is dismissed. The time will run from the date of conviction.

The Court would like to say they are very much indebted to both counsel for the way in which they conducted the case and put the matter before the Court. It was not altogether easy.

Appeal dismissed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE ATKINSON AND
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ANTHONY CEDRIC SEBASTIAN STEANE.

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Offence Involving Specific Intent—Burden of Proof—Direction to Jury—Acts Likely to Assist the Enemy—Intent to Assist the Enemy—Defence (General) Regulations, 1939 (S. R. & O., 1939, No. 927), reg. 2A (rep.).

Where the essence or a necessary constituent of an offence is a particular intent, that intent must be proved by the Crown just as much as any other fact necessary to constitute the offence, and the burden of proving that intent remains throughout on the prosecution.

If the prosecution prove an act the natural consequences of which would be a certain result and no evidence or explanation is given, then the jury may, on a proper direction, find that the prisoner is guilty of doing the act with the intent alleged; but if on the totality of the evidence there is room for more than one view as to the prisoner's intent, the jury should be directed that it is for the prosecution to prove the intent to the jury's satisfaction, and if, on a review of the whole evidence, they either think that the intent did not exist or they are left in doubt as to the intent, the prisoner is entitled to be acquitted.

When an act has been done by a person in subjection to an enemy power, an inference that he intended the natural consequences of his acts should not be drawn merely from the fact that he did them. The guilty intent cannot be presumed and must be proved.

Appeal against conviction.

The appellant was convicted at the Central Criminal Court on January 15, 1947, of doing acts likely to assist the enemy, with intent to assist the enemy, contrary to Regulation 2A of the Defence (General) Regulations, 1939 (rep.), and was sentenced by Henn Collins, J., to three years' penal servitude.

The appellant, a British subject, was before the war employed as a film actor in Germany, where he resided with

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his wife and two children. In January, 1940, the appellant entered the service of the German broadcasting system and on several occasions broadcast certain matters through that system. The principal evidence against him was a statement taken from him by an officer of the British Intelligence Service in October, 1945, which purported to give an account of his broadcasting activities. The statement referred to an earlier written report, dated July 5, 1945, made to the American C.-I.-C. at Augsburg, which was not produced. The appellant gave evidence at the trial, in the course of which he said that he had on several occasions been ill-treated by the enemy, and that he was in continual fear for the safety of his wife and children. There was no record of the actual broadcasts made by the appellant.

G. D. Roberts, K.C., and *E. Clarke*, for the appellant: The summing-up was defective, in that the jury were never told that intent to assist the enemy must be proved strictly by the prosecution. The appellant's case was that his intent in entering the service of the German broadcasting system was to safeguard his wife and children, and if the jury believed that, the appellant was entitled to acquittal. The presumption that a man must be taken to intend the natural consequences of his act does not apply to circumstances such as these, and the jury should have been reminded of the threats to which the appellant had been exposed and of the atmosphere of terror to which he was subjected.

Gerald Howard and *J. S. Bass* for the Crown: It was clear on the evidence that the appellant did an act likely to assist the enemy, and his act must, therefore, in the absence of accident, be presumed to have been done with intent to assist the enemy. His motive, as distinct from his intent, was immaterial, unless the defence of duress was being relied on by the appellant. [He referred to *Stephen's History of the Criminal Law*, vol. II, at pp. 110–111.] It is possible, too, for a person to have more than one intent for an act. To establish the defence of duress, fear of immediate death or instant bodily injury must be established, and fear of future

pains and penalties will not suffice. [He referred to Stephen's *History of the Criminal Law*, vol. II, p. 108; *Hale*, 1 P.C., vol. VIII, p. 49 and *Russell on Crime* (9th ed.), vol. I, p. 41.]

G. D. Roberts, K.C., replied.

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LORD GODDARD, L.C.J. : The appeal will be allowed and the conviction quashed. We will give our reasons for this decision at a later date.

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May 1.—The judgment of the Court was read by :

THE LORD CHIEF JUSTICE : The appellant was convicted at the Central Criminal Court before Henn Collins, J., on an indictment which charged him with doing acts likely to assist the enemy with intent to assist the enemy. He was convicted on the first count of the indictment, and the jury were discharged from returning a verdict in respect of the other eight counts which the indictment contained. He was sentenced to three years' penal servitude, and on March 31 last obtained leave to appeal on the ground of misdirection. This Court heard and allowed the appeal on April 15 and discharged the appellant and now proceeds to give the reasons for so doing.

The count on which he was convicted charged him with entering the service of the German broadcasting system on a date in January, 1940, and it was common ground and admitted by the appellant that he did so enter that service and on several occasions broadcast certain matters through that system. The evidence called by the prosecution was that of one witness who did not carry the matter very far beyond proving that the appellant did in fact broadcast, but also said that he had seen a telegram in the appellant's possession signed Emmie Goering, which stated that he could expect to be released and be home very shortly. The principal evidence against him was a statement taken from him by an officer of the British Intelligence Service in October, 1945, which purported to give an account of his activities in the German Broadcasting Service. It is to be observed that this statement concludes in this way : " I have read this statement over, and

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to the best of my knowledge and belief it is all true, and must request it to be used in conjunction with my written report, dated July 5, 1945, to the American C.-I.-C. in Augsburg". This previous statement or report was, however, not produced. This was no doubt inevitable but none the less unfortunate, especially as the appellant in his evidence before the jury maintained that many matters were contained in that report which he accordingly did not restate in the statement which he made to the Intelligence officer. It seems, and this again was common ground, that before the war he was employed in Germany as a film actor and was so engaged when the war broke out. His wife and two sons were living in Germany. The appellant was at once arrested and taken to Berlin, and his wife and two sons remained in Oberammergau. The only other evidence in the case was that of the appellant himself. It was to this effect: that he was at once arrested and questioned, that the interview ended with the order, "Say 'Heil Hitler', you dirty swine". He refused, and was thereupon knocked down, losing several teeth, and was then interned. This was on September 11. Just before Christmas he was sent for by Goebbels, who asked him to broadcast. He refused. He was thereupon warned that he was in an enemy country and that they had methods of making people do things. A week later an official named von Bockman saw him and dropped hints as to German methods of persuasion. A professor named Kossuth also warned him that these people could be dangerous with those who gave trouble. In consequence of these matters he submitted to a voice test, trying to perform as badly as he could. The next day he was ordered to read news three times a day, and did so until April. In April he refused to do any more broadcasting. Two G men called upon him. They said, "If you don't obey, your wife and children will be put in a concentration camp".

In May three G men saw him, and he was badly beaten up, one ear being partly torn off. He agreed to work for his old employers, helping to produce films. There was no evidence that the films he helped to produce were or could be of any

assistance to the Germans or at all harmful to this country. He swore that he was in continual fear for his wife and children. When the Americans overran the part of Germany in which he was, he reported to them, giving on August 5, 1945, a statement of his history during the war. In October, 1945, an English official, Captain Shorter, saw him, and to him the appellant made another statement. The appellant also asserted again and again and said that he had done so in the written report of July 5 which, as we have already said, was not produced, that he never had the slightest idea or intention of assisting the enemy and what he did was done to save his wife and children, and that what he did could not have assisted the enemy except in a very technical sense. Unlike the evidence which has been adduced in many other similar cases, there was no record of the actual broadcasts made by the appellant. This again was no doubt inevitable, but unfortunate, as the actual tone of the broadcast might have thrown some light upon the motives and intentions of the appellant, but in the opinion of the Court there was undoubtedly evidence from which a jury could infer that the acts done by the appellant were acts likely to assist the enemy. The far more difficult question that arises, however, is in connection with the direction to the jury with regard to whether these acts were done with the intention of assisting the enemy. The case as opened and indeed as put by the learned Judge appears to this Court to be this: a man is taken to intend the natural consequences of his acts. If, therefore, he does an act which is likely to assist the enemy, it must be assumed that he did it with the intention of assisting the enemy. Now the first thing which the Court would observe is that where the essence of an offence or a necessary constituent of an offence is a particular intent, that intent must be proved by the Crown just as much as any other fact necessary to constitute the offence. The wording of the Regulation itself shows that it is not enough merely to charge a prisoner with doing an act likely to assist the enemy; he must do it with the particular intent specified in the Regulations. While no doubt the motive of

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a man's act and his intention in doing the act are in law different things, it is none the less true that in many offences a specific intention is a necessary ingredient, and the jury have to be satisfied that a particular act was done with that specific intent, although the natural consequences of the act might, if nothing else was proved, be said to show the intent with which it was done. To take a simple illustration, a man is charged with wounding with intent to do grievous bodily harm. It is proved that he did severely wound the prosecutor. Nevertheless, unless the Crown can prove that the intent was to do the prosecutor grievous bodily harm he cannot be convicted of that felony. It is always open to the jury to negative by their verdict the intent and to convict only of the misdemeanour of unlawful wounding. Or again, a prisoner may be charged with shooting with intent to murder. Here again the prosecution may fail to satisfy the jury of the intent although the natural consequence of firing perhaps at close range would be to kill. The jury can find in such a case an intent to do grievous bodily harm, or they might find that if the person shot at was a police constable the prisoner was not guilty on the count charging intent to murder but guilty of intent to avoid arrest. The important thing to notice in this respect is that where an intent is charged in the indictment, the burden of proving that intent remains throughout on the prosecution. No doubt if the prosecution prove an act the natural consequences of which would be a certain result and no evidence or explanation is given, then a jury may on a proper direction find that the prisoner is guilty of doing the act with the intent alleged, but if on the totality of the evidence there is room for more than one view as to the intent of the prisoner, the jury should be directed that it is for the prosecution to prove the intent to the jury's satisfaction, and if on a review of the whole evidence they either think that the intent did not exist or they are left in doubt as to the intent, the prisoner is entitled to be acquitted. In many offences it is unnecessary to allege any particular intent. The commonest case is in larceny where the prisoner is simply charged with

stealing. If the evidence shows that the prisoner picked a person's pocket, there is no necessity to prove that he intended to steal, although he may give some evidence in defence which would lead the jury to believe that he was not acting with a felonious intent. But we repeat that where a particular intent must be laid and charged, that intent has to be proved. An illustration given by the learned Judge in the course of his rather brief summing-up related to what are commonly called the Blackout Regulations. He pointed out to the jury that if a person accidentally omitted to put up his blackout curtains or left some gap in them, although he was doing an act likely to assist the enemy, as it was accidental, he would not be committing the offence with intent to assist the enemy. Matters which involve accidental acts are perhaps not altogether a happy illustration. A nearer case would be if a person deliberately took down his blackout curtains or shutters with the result that light appeared on the outside of his house, perhaps during an air raid; it might well be that if no evidence or explanation were given and if all that was proved was that during that raid the prisoner exposed lights by a deliberate act, a jury could infer that he intended to signal or assist the enemy. But if the evidence in the case showed, for instance, that he or someone was overcome by heat and that he tore down the blackout to ventilate the room, the jury would certainly have to consider whether his act was done with intent to assist the enemy or with some other intent, so that while he would be guilty of an offence against the Blackout Regulations, he would not be guilty of the offence of attempting to assist the enemy.

In this case the Court cannot but feel that some confusion arose with regard to the question of intent by so much being said in the case with regard to the subject of duress. Duress is a matter of defence where a prisoner is forced by fear of violence or imprisonment to do an act which in itself is criminal. If the act is a criminal act, the prisoner may be able to show that he was forced into doing it by violence, actual or threatened, and to save himself from the consequences of that

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violence. There is very little learning to be found in any of the books or cases on the subject of duress, and it is by no means certain how far the doctrine extends, though we have the authority both of Hale and of Fitzjames Stephen that while it does not apply to treason, murder and some other felonies, it does apply to misdemeanours; and offences against the Regulations are misdemeanours. But here again, before any question of duress arises, a jury must be satisfied that the prisoner had the intention which is laid in the indictment. Duress is a matter of defence, and the onus of proving it is on the accused. As we have already said, where an intent is charged on the indictment, it is for the prosecution to prove it, so the onus is the other way.

Now another matter which is of considerable importance in this case, but does not seem to have been brought directly to the attention of the jury, is that very different considerations may apply where the accused at the time when he did the acts is in subjection to an enemy power and where he is not. British soldiers who were set to work on the Burma road or, if invasion had unhappily taken place, British subjects who might have been set to work by the enemy digging trenches would undoubtedly be doing acts likely to assist the enemy. It would be unnecessary surely in their cases to consider any of the niceties of the law relating to duress because no jury would find that merely by doing this work they were intending to assist the enemy. In our opinion it is impossible to say that where an act was done by a person in subjection to the power of others, especially if that other be a brutal enemy, an inference that he intended the natural consequences of his acts must be drawn merely from the fact that he did them. The guilty intent cannot be presumed and must be proved. The proper direction to the jury in this case would have been that it was for the prosecution to prove the criminal intent, and that while the jury would be entitled to presume that intent if they thought that the act was done as the result of the free uncontrolled action of the accused, they would not be entitled to presume it if the circumstances showed that the act was

done in subjection to the power of the enemy or was as equally consistent with an innocent intent as with a criminal intent, for example, a desire to save his wife and children from a concentration camp. They should only convict if satisfied by the evidence that the act complained of was in fact done to assist the enemy and if there was doubt about the matter the prisoner was entitled to be acquitted. It is to be observed also in this case that in summing-up the learned Judge did not remind the jury of the various threats to which the prisoner swore he had been exposed. The jury might, of course, have disbelieved his evidence. The matters of these threats depended upon his evidence alone, and while it is fair to say that he does not appear to have been in any way shaken in cross-examination on these matters, the jury were not necessarily bound to believe it. But we do not think that the summing-up contained anything like a full enough direction as to the prisoner's defence. The defence must be fully put to the jury, and we think they ought to have been reminded of various matters upon which the accused relied as negating the intent. The jury may well have been left under the impression that as they were told that a man must be taken to intend the natural consequences of his acts, these matters as to which he had given evidence were of no moment.

On both these grounds, therefore, we were of opinion that the conviction could not stand and accordingly quashed it.

Conviction quashed.

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BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE ATKINSON AND
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1947.
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GEORGE BERRY.

Indictable Offence—Preliminary Investigation—Committal for Trial—Statutory Caution—Ruling by Justices before Caution Administered—Criminal Justice Act, 1925 (15 & 16 Geo. 5, c. 86), s. 12 (2), (8)—Administration of Justice (Miscellaneous Provisions) Act, 1933 (23 & 24 Geo. 5, c. 86), s. 2 (2).

At the preliminary investigation into an indictable offence, immediately after the last witness for the prosecution had given his evidence, and before the justices had administered to the prisoner the statutory caution prescribed by section 12 (2) of the Criminal Justice Act, 1925, the prisoner's solicitor made a submission that there was no case for committal for trial. The justices heard the submission, and ruled that there was a *prima facie* case for committal in custody to the next assizes. The justices then administered the statutory caution and gave the prisoner the opportunity of making a statement, giving evidence and calling witnesses, but the prisoner, after protesting against the procedure, said that he was Not Guilty and reserved his defence. The prisoner appealed on the ground of alleged non-compliance with section 12 (2) and (8) of the Act of 1925, in that the justices had determined to commit before he had had the opportunity of making a statement, giving evidence or calling witnesses.

Held, that the justices in ruling on the solicitor's submission had done no more than decide that at that moment there was sufficient evidence on which to commit the prisoner, and that the actual committal had not taken place until after the statutory caution had been administered, and the prisoner had been given an opportunity of making a statement, giving evidence and calling witnesses, and that there had not, therefore, been any failure to comply with the provisions of section 12.

Appeal against conviction.

The appellant was convicted at Gloucestershire Assizes on

January 30, 1947, of shopbreaking and larceny, and was sentenced by Wrottesley, J., to two years' imprisonment.

At the preliminary hearing before the committing justices the appellant was represented by a solicitor who, immediately after the witnesses for the prosecution had given their evidence, but before the caution required by section 12 (2) of the Criminal Justice Act, 1925, had been administered, submitted that there was no case for committal for trial. The justices ruled that "there was a *prima facie* case for committal in custody to the next Gloucester Assizes", and then gave the statutory caution. The appellant was committed for trial in due course, but at his trial moved to quash the indictment on the ground that the committal was bad. Wrottesley, J., after argument, ruled against the motion.

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E. Brian Gibbens, for the appellant:

Section 2 (2) of the Administration of Justice (Miscellaneous Provisions) Act, 1933, provides that no bill of indictment shall be preferred unless the person charged has been committed for trial or leave has been given by a Judge of the High Court. Therefore (in the absence of leave of a Judge) if the committal is bad the bill of indictment cannot be preferred. Section 12 of the Criminal Justice Act, 1925, lays down the procedure for a proper committal, and sub-section (8) provides that, before reaching their determination, the justices shall take into consideration any statement made by the accused. Here the justices indicated their decision before the accused person had made a statement, and the premature submission made by his solicitor is no excuse. The words "*prima facie* case for committal" do not save the justices' ruling from being their determination of the matter, because the ultimate limit of their jurisdiction in an indictable offence is to decide whether there be a *prima facie* case for trial or not. It would have been unexceptionable if they had merely ruled that there was "a *prima facie* case to answer". Further, the use of the words "in custody" reveals that the justices had already formed their decision without waiting to hear the accused

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person. As the statutory requirements had not been fulfilled, the appellant had not been properly committed for trial and was not properly indicted.

R. G. Micklethwait, for the Crown, was not called on.

THE LORD CHIEF JUSTICE: Two points have been taken on behalf of the appellant. The first point, which was taken at his trial, and has very properly been taken by Mr. Gibbens here, is that the committal for trial was bad. Since the passing of the Administration of Justice (Miscellaneous Provisions) Act, 1933, which abolished grand juries—which fact many people possibly regret—for presentment by the grand jury there was substituted committal for trial alone. By section 2 (2) it was provided that “no bill of indictment charging any person with an indictable offence shall be preferred unless either (a) the person charged has been committed for trial for the offence; or (b) the bill is preferred by the direction or with the consent of a Judge of the High Court or pursuant to an order made under section 9 of the Perjury Act, 1911”. In this case nothing arises under the latter part of the sub-section. The question is whether there was a valid committal for trial for the offence. It is said that the committal was bad for a reason to which I shall refer in a moment.

There was a case in this Court some years ago, *GEE & OTHERS*, 25 Cr. App. R. 198; [1936] 2 K. B. 442, in which the examining justices had not acted in accordance with the provisions of section 17 of the Indictable Offences Act, 1848, because they had accepted prepared statements of witnesses, which were just handed to the witnesses and the witnesses then said were true, and there had been no examination of the witnesses before the justices. In that case this Court was obliged to hold that there had not been a proper committal for trial. In the present case the justices heard the whole of the evidence preferred by the prosecution, but, apparently, before they had time to put to the prisoner the nature of the charge and ask him whether he wished to answer it, to give evidence or call witnesses, the prisoner’s solicitor

submitted that there was no case to answer. As the solicitor chose to make that submission, the justices naturally had to rule upon it. I suppose they might have said: "Sit down; we are going to put the statutory caution to the prisoner, and we will hear you afterwards", but the solicitor, having got up and caught the ear of the Court, made his submission, which was a full and lengthy one. How he could have submitted that there was no case to answer, I do not know. Having heard the submission, the justices said: "There is sufficient *prima facie* evidence to justify us in committing the accused for trial"; in other words, they did not agree with the submission. They then proceeded to put the statutory caution to the prisoner and invited him to say something, whereupon, obviously acting under the advice of his solicitor, because this is not the sort of thing that a prisoner would say without being instructed, the prisoner said: "Just now I thought the case was finished because the magistrate said bail had been refused, or words to that effect. I did not get a chance to plead before the case was closed. The question which has just been read to me was read after the magistrate had said that there was sufficient evidence. I very strongly object to that procedure. I am not guilty, and I reserve my defence". The justices then gave the statutory caution, and the prisoner had an opportunity of making a statement in answer. At the time when the justices ruled on the solicitor's submission, there had not been a committal for trial. All that the justices then said was, "At the present moment there is sufficient evidence to commit the prisoner for trial", as there was. Thereafter he had every opportunity of giving evidence or calling witnesses, but he said, "I will not say anything; I am going to stand here and reserve my defence". After that he was properly committed for trial. In the opinion of the Court, there has been no miscarriage of justice and no disregard of the Indictable Offences Act, 1848, or the Criminal Justice Act, 1925.

Another point was taken on his behalf, that the learned Judge did not direct the jury on the alternative count for

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receiving. Everybody knows that, as a rule, clerks of assize include such a count in an indictment for larceny or shop-breaking. That has on occasions led to a miscarriage of justice, because prisoners have escaped in cases where the evidence has clearly established the charge of breaking and entering (or larceny), and the jury for some reason or other have returned a verdict of not guilty of breaking and entering (or larceny), but guilty of receiving. In several cases lately this Court has pointed out the unsatisfactory position that has arisen, where the Judge or Chairman did not give a direction on the charge of receiving, because he did not think that it was necessary to do so, and the jury, instead of convicting of the offence on which they ought to have convicted, convicted on the charge of receiving when there was no evidence of receiving. In this case the Judge perfectly properly confined his summing-up to the charge of breaking and entering, and the jury found the prisoner guilty on that charge. There was ample evidence on which they could so find, and the only comment which the Court makes is that, if the appellant had been unwise enough to appeal against sentence as well as against conviction, they would have seriously considered whether this was not a case in which the sentence ought to be increased. There is no ground for interfering with this conviction, and the appeal is dismissed.

Appeal dismissed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE ATKINSON AND
MR. JUSTICE LEWIS.

ANTHONY WILLIAM YEOMANS.

1947.
June 30.

Sentence—Borstal Detention—Duty of Committing Justices—No Power to Commit to Adjoining Sessions—Criminal Justice Administration Act, 1914 (4 & 5 Geo. 5, c. 58), s. 10—Criminal Justice Act, 1925 (15 & 16 Geo. 5, c. 86), ss. 14, 46.

Where justices have convicted a young offender and have decided to commit him to a higher Court with a view to his there being sentenced to Borstal detention, they should commit him to the next Court, whether quarter sessions or assizes, that is to be held for the area within which the Court of summary jurisdiction lies, but they have no power to commit him to a Court of quarter sessions or assizes for any other area.

FRANKS (*ante*, p. 41) considered and explained.

Application for leave to appeal against sentence.

The appellant was convicted on March 7, 1947, at Andover County Magistrates' Court of larceny and was committed, under section 10 of the Criminal Justice Administration Act, 1914, to Hampshire Quarter Sessions, where on April 15, 1947, he was sentenced to three years' Borstal detention.

No counsel appeared.

THE LORD CHIEF JUSTICE: This lad was brought before a court of summary jurisdiction, the county bench at Andover, on March 7, 1947. He had apparently been in custody since February 3. Why he was in custody from February 3 till March 7 before he was brought before the justices, I do not know, and for the purposes of what I am about to say, it does not really very much matter.

On March 7 he was convicted by the justices and committed by them for sentence to the Hampshire Quarter Sessions in

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order that quarter sessions, if they thought right, should send him to Borstal detention. The charges were stealing fifteen cockerels from a Miss Walker, and two ducks and a chicken from another person. He had four previous convictions, and no doubt, therefore, it was a very proper course for the justices to send him up to a higher Court in order that that Court might, if it thought fit, send him to Borstal detention. He now appeals against that sentence, but the Court sees no reason to interfere, as they think that it was a perfectly proper sentence.

This case, however, gives the Court the opportunity of making further observations with regard to the case of FRANKS, (*ante*, p. 41) which was before this Court on March 10, 1947. That was a case in which, also, a boy was sent to quarter sessions with a view to a sentence of Borstal detention. It happened also in that case that he had to be kept in custody for a very considerable time before the next sessions were held, and this Court did say in that case, as they would say in this case, that in view of the fact that the assizes for the county were to be held at a much earlier date, and that a committal to assizes would have involved the boy being kept in custody awaiting sentence for a less time, it would have been appropriate if he had been sent to the assizes for the Judge to deal with him instead of being kept in custody till the Easter Sessions.

In FRANKS' CASE (*supra*) I did say, and it was a mistake on my part, that my attention had been called to the provisions of section 14 of the Criminal Justice Act, 1925, and that under that Act he could have been sent to any convenient quarter sessions or assizes there to be dealt with. That appears to be wrong, because section 10 of the Criminal Justice Administration Act, 1914, which is the Act (as subsequently amended) under which justices who convict a young offender can send him forward to assizes or quarter sessions, provides that "it shall be lawful for the Court in lieu of passing sentence to commit the offender to prison until the next assizes or quarter sessions, whichever appears to the Court to be more convenient". Then it provides that "the court of assize or court

of quarter sessions, as the case may be, shall inquire into the circumstances of the case and ", if it appears right to them to do so, pass sentence of Borstal detention.

When that Act was passed, the only Courts to which magistrates could commit were the quarter sessions for the county or borough, as the case might be, and it is quite obvious, therefore, that the words " the next assizes or quarter sessions " (these words having been substituted for the original words by section 46 of the Criminal Justice Act, 1925) must be read as meaning the next assizes or quarter sessions for the area within which the court of summary jurisdiction lies.

Section 14 of the Criminal Justice Act, 1925, provides : " The justices before whom any person is charged with an indictable offence, may, instead of committing him to be tried at the assizes or quarter sessions for a place to which but for this section he might have been committed, commit him to be tried at the assizes for some other place or (if the offence is within the jurisdiction of a court of quarter sessions) at the quarter sessions for some other place if it appears to them, having regard to the time when and the place where the last-mentioned assizes or quarter sessions are to be held, to be more convenient to commit the accused person to those assizes or quarter sessions with a view to expediting his trial or saving expense ". Unfortunately, that section—and this is where I think I fell into error in FRANKS' CASE (*supra*)—does not apparently permit justices who have convicted a young offender, and who desire that he should be dealt with under section 10 of the Act of 1914, to send him to a court other than the court for the county or borough in which he was convicted.

Accordingly, FRANKS' CASE (*supra*) and this case must be taken as deciding that it is right, where a boy or a young person is to be committed to a higher Court with a view to a sentence of Borstal detention, that he should be sent to the next Court, whether assizes or quarter sessions, for the area within which the court of summary jurisdiction lies and if the assizes are to be held, as I think they would have been

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in this case, before the quarter sessions, it is proper for magistrates to commit to the assizes. Ordinarily speaking, of course, the matter is one appropriate to a court of quarter sessions, but the Act (as amended) expressly provides that the offender can be committed to assizes or quarter sessions and, just as in FRANKS' CASE (*supra*), in this case also, as the assizes would have come before the quarter sessions, it would have been right in those circumstances to commit the convicted boy to the assizes and not wait till quarter sessions. But, as the section stands at present, it is not competent to magistrates to send him to an adjoining quarter sessions or assizes in another county. For instance, there could not have been a committal to Andover Borough Quarter Sessions in the present case, even if those sessions were soon to be held. FRANKS' CASE (*supra*) must, therefore, not be regarded any longer as authorising magistrates to commit to an adjoining sessions, but both FRANKS' CASE (*supra*) and this case emphasise that there should be a committal to the first Court that is to be held, whether it is an assize court or whether it is a court of quarter sessions, having jurisdiction over the place where the offence was committed.

Application refused.

INCREASES OF SENTENCE.

The Court increased sentences passed on appellants in the following cases:—

On May 5, CYRIL WALTER CRICK, sentenced at the County of London Sessions to fifteen months' imprisonment for three offences of obtaining property by false pretences, thirteen outstanding offences being taken into consideration, sentence increased to three years' penal servitude.

On May 21, ROBERT JOHN BROOKES, sentenced at

Birmingham Quarter Sessions to three years' Borstal detention for three offences of housebreaking and larceny, twenty-two outstanding offences being taken into consideration, sentence increased to three years' penal servitude.

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On May 21, ALBERT GERRITT FOSTER ROPER, sentenced at Lancashire Quarter Sessions to two years' imprisonment for three offences of larceny, two outstanding offences being taken into consideration, sentence increased to three years' penal servitude.

On June 16, ARTHUR FREDERICK SMITH, sentenced at Manchester Assizes to seven years' penal servitude for attempted murder, sentenced increased to ten years' penal servitude.

On June 30, JOHN ERNEST LOMAS, sentenced at Manchester Quarter Sessions to eighteen months' imprisonment for larceny from the person, sentence increased to three years' penal servitude.

On June 30, EDNA MAY REES, sentenced at the County of London Sessions to eighteen months' imprisonment for larceny, sentence increased to four years' penal servitude.

On July 7, ROBERT CHARLES PEAK, sentenced at the Central Criminal Court to four years' penal servitude for robbery with violence, to run concurrently with a sentence of two years' imprisonment which he was then serving, sentence increased by being ordered to be consecutive to the earlier sentence.

FURTHER OBSERVATIONS ON GRANTING OF BAIL BY MAGISTRATES.

At Cambridge Assizes on May 19^a, the Lord Chief Justice criticised the Cambridge magistrates for granting bail to two men pending their trial, after the police had objected.

The Lord Chief Justice said : ‘ I do hope that the magistrates of this borough and generally will pay some attention to what the Court of Criminal Appeal recently said in regard to bail in these cases. Time and again the courts find that men with records are charged with offences which are felonies and for some reason they are admitted to bail although they do not show the smallest defence, and very often, as in these cases, admit the offence. What is the consequence? The consequence is exactly the same as in this case. While they are on bail they commit other offences. It is perfectly preposterous that any men with records like these should be let out on bail when there is not the slightest doubt that they have committed the offence, which here they admit.

The magistrates can trust the courts, whether assizes or quarter sessions, to take into consideration, in dealing with cases, the length of time prisoners have been detained in prison. In this case the only result of the magistrates’ having granted bail is that now these men are up on a further charge of breaking and entering, so that the sentence they will receive is very largely due to the fact that they were let out on bail ’

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY AND
MR. JUSTICE LYNSEY.

ABRAHAM BUTTERWASSER.

1947.
July 28.

Character of Prisoner—Attack on Crown Witness during Case for Prosecution—No Evidence given by Prisoner—Prosecution Allowed to give Evidence-in-Chief of Prisoner's Previous Convictions—Proof of Previous Convictions during Trial—Criminal Evidence Act, 1898 (61 & 62 Vict. c. 63), s. 1 (f) (ii).

During the case for the prosecution the prisoner's counsel cross-examined the prosecutor and the prosecutor's wife on their previous convictions, which they admitted. The prisoner did not put his own character in issue nor did he give evidence himself, but when it was stated by the prisoner's counsel that he would call no evidence, the Judge permitted the prosecution to give evidence-in-chief of the prisoner's previous convictions. To prove these a police officer was called, who stated that, according to the records at Scotland Yard, certain convictions were recorded against the prisoner, but he did not purport to identify the prisoner with any of the convictions referred to in the records. The prisoner was convicted.

Held, that the conviction must be quashed on the grounds that (i) the evidence of the prisoner's previous convictions had been wrongly admitted, the right of the prosecution, in a case where the prisoner had not put his own character in issue, being limited to that conferred by section 1 (f) (ii) of the Criminal Evidence Act, 1898, namely, that of cross-examining the prisoner on his own bad character and previous convictions if he elected to go into the witness-box; (ii) the previous convictions of the prisoner had not been properly proved, it being necessary, in a case where the prosecution seek to prove a previous conviction of the prisoner before verdict, that there should be proper evidence of identity of the prisoner with the person referred to in any document or record produced.

ROWTON (1865), L. & C. 520; 10 Cox C. C. 25, referred to.

Appeal against conviction.

The appellant was convicted at the Central Criminal Court

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on May 20, 1947, of wounding with intent, and was sentenced by the Recorder of London to three years' penal servitude.

At the trial, during the course of the prosecutor's evidence, defending counsel put to the prosecutor in cross-examination certain previous convictions for violence, etc., which the prosecutor admitted, and adopted a similar course with regard to the prosecutor's wife. The prisoner did not put his character in issue and at the close of the case for the prosecution, defending counsel stated that he did not propose to call any evidence, and the prisoner did not go into the witness-box. Counsel for the prosecution obtained leave from the Judge to give evidence-in-chief of the prisoner's previous convictions, and for this purpose called a police officer, who produced a record from Scotland Yard purporting to set out a number of previous convictions of the prisoner, but the officer did not purport to speak of his own knowledge or to identify the prisoner with any of the convictions referred to in the record.

J. Burge, for the appellant :

The previous convictions of the appellant should not have been given in evidence. The case did not come within any of the recognised exceptions to the ordinary rule that no evidence can be given of the previous character of the prisoner. The Criminal Evidence Act, 1898, did not apply, because that statute has application only where the prisoner gives evidence, and it is significant that neither that statute nor any other confers on the prosecution any right to call evidence merely by reason of the fact that the prisoner has attacked a witness for the prosecution. The right of the prosecution in such circumstances is limited to that prescribed by the Act of 1898—namely, cross-examining the prisoner on his character and previous convictions if he elects to give evidence. Different principles apply where the prisoner puts his own character in issue. In such a case the prosecution can call evidence of the prisoner's bad character or previous convictions. [He referred to *SHRIMPTON* (1851), 2 Den. 319; 5 Cox C. C. 389,

and DUNCAN, 30 Cr. App. R. 70; [1944] K. B. 713.] In the present case there was no question of the appellant having put his own character in issue. The questions put to the witnesses for the prosecution were put solely for the purpose of discrediting those witnesses. Further, even if evidence of the previous convictions was admissible, the convictions were not properly proved. The police officer who read out the list had not been present on the occasion of any of the convictions and did not purport to identify the appellant. His evidence was, therefore, merely hearsay.

Eric Neve, K.C., and W. M. F. Hudson, for the Crown :

This is by no means the first time that evidence of this kind has been adduced by the prosecution when a prisoner has not gone into the witness-box. It has happened on several occasions without the admissibility of the evidence being questioned. The real test is whether the evidence was relevant, and in this case it clearly was relevant. In SHRIMPTON, (1851), 2 Den. 319, 324; 5 Cox C. C. 387, 389, Lord Campbell said: "If, either by calling witnesses on his part, or by cross-examination of the witnesses for the Crown, the prisoner relies upon his good character, it is lawful for the prosecutor to give the previous convictions in evidence". The same principle must apply where the witnesses for the prosecution are attacked by the prisoner with a view to establishing his own innocence by discrediting them. [He referred also to ROWTON (1865), L. & C. 520; 10 Cox C. C. 25, and HUDSON, 7 Cr. App. R. 256; [1912] 2 K. B. 464.] On the second point, the evidence of the police officer was not rendered inadmissible by reason of the fact that he had no personal knowledge of the previous convictions. Such evidence is commonly received after verdict, and if it is admissible after verdict, there is no reason why it should not be received before verdict, if otherwise admissible. [He referred to ROCHE (1944), 30 Cr. App. R. 29.]

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THE LORD CHIEF JUSTICE: The prisoner in this case was convicted before the learned Recorder at the Central Criminal

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Court of wounding with intent and sentenced to three years' penal servitude, and he appeals on two matters of law.

It was a serious case, and if the prisoner had been convicted on legal evidence it was obviously a bad case, the allegation being that the prisoner slashed the prosecutor, after an altercation in the street, with a razor.

During the course of the prosecutor's evidence, learned counsel for the prisoner, quite rightly from his point of view, as no doubt it was a necessary part of the defence he put up, attacked the witnesses for the prosecution. He attacked the character of the prosecutor and of the prosecutor's wife, and he put to them convictions which they had, and which they had to admit, convictions for violence, and so forth. Of course, he did that because he wanted to discredit their evidence, and no doubt was suggesting, as I think the questions did suggest, and I do not doubt for a minute were meant to suggest, that it was really the prosecutor who attacked the prisoner.

Having done that, Mr. Burge knew quite well that if he called the prisoner, the prisoner would have been liable to be cross-examined as to his previous convictions, and there is no doubt that the prisoner is a violent man and has got convictions for violence. In fact, he admitted after verdict that he had been convicted, and I should think so far as character is concerned there was not a pennyworth of difference between the prisoner and the prosecutor. However that may be, we have to consider whether what was then done was in accordance with law. When it became clear that Mr. Burge was not going to call his client because, as I say, he was much too wise to do that after he had attacked the witnesses for the prosecution, the prosecution sought and were allowed to give evidence-in-chief of the prisoner's bad character. A police officer was called who testified to the prisoner's previous convictions and general character.

In the opinion of the Court, that was a course which cannot possibly be allowed as the law is at present. It is elementary law that during the last 150 or perhaps 200 years, ever since

the practice has grown up of allowing a prisoner to call evidence of good character, or where he has put questions to witnesses for the Crown and obtained or attempted to obtain admissions from them that he is a man of good character, in other words, where the prisoner himself puts his character in issue, evidence in rebuttal can be given by the prosecution to show that he is in fact a man of bad character.

Evidence of character nowadays, I think, is very loosely given and very loosely received, and it would be as well if all Courts paid attention to a well-known case in the Court of Crown Cases Reserved, *ROWTON* (1865), L. & C. 520; 10 Cox C. C. 25, in which a Court of twelve Judges laid down the principles which should govern the giving of evidence of character and of evidence of bad character in rebuttal. It was pointed out that the evidence must be evidence of general reputation and not dependent upon particular acts or actions. But however that may be, there is no case to be found in the books, and it is certainly contrary to what all the present members of the Court have understood during the whole of the time which they have been in the profession, that where the prisoner does not put his own character in issue but has merely attacked the witnesses for the prosecution, that evidence can be called for the prosecution to prove that the prisoner is a man of bad character.

What is, of course, permissible is, that if a prisoner takes advantage of the Act of 1898, which made prisoners competent witnesses on their trial in all cases, and goes into the witness box, he may then, if he has attacked the witnesses for the prosecution, be cross-examined with regard to convictions and matters of character; and I have no doubt that if he is cross-examined and a conviction is put to him and he denies it, as the matter has become admissible, the provisions of Denman's Act would apply and the conviction could be proved against him. But it is admitted that there is no authority, and I do not see on what principle it could be said, that if a man does not go into the box and put his own character in issue, he can have evidence given against him of previous bad character

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when all that he has done is that he has attacked the witnesses for the prosecution.

The reason is that by attacking the witnesses for the prosecution and suggesting that they are unreliable, he is not putting his character in issue; he is putting their character in issue. If it is right to say either character is put in issue, he is certainly not putting his character in issue, and the reason why, if he has attacked the witnesses for the prosecution, he can be cross-examined if he gives evidence, is that the statute says that he can. It seems to me, therefore, that it is impossible to say that, because the prisoner in this case attacked the witnesses for the prosecution but did not himself give evidence evidence of his bad character was admissible. In those circumstances, the learned Recorder should have declined to allow the evidence to be given, the evidence should not have been given, and therefore inadmissible evidence on a most vital point was admitted in this case.

But the matter does not rest there entirely. As we have held that the evidence was not admissible, the character of the evidence does not really very much matter in this case. We all know, however, that there are certain cases where it is generally permissible to give evidence of bad character on the part of the prisoner because a statute has provided that it can be done. In certain cases under the Larceny Act, 1916, and in certain cases under the Prevention of Crimes Act, 1871, it can be done. There are other cases, no doubt, in which it becomes inevitable because it is relevant and is a matter directly in issue, but speaking generally, to use the words of Cockburn, C.J., in *ROWTON'S CASE* (1865), L. & C., at p. 530; 16 Cox C. C., at p. 29: "Although, logically speaking, it is quite clear that an antecedent bad character would form quite as reasonable a ground for the presumption and probability of guilt as previous good character lays the foundation of innocence, yet you cannot, on the part of the prosecution, go into evidence as to bad character". The learned Chief Justice is there, of course, speaking generally, and it has been pointed out that you may be able, either

because of the provisions of a statute, or because of the circumstances of the case, in certain cases to give evidence of bad character. I illustrated that matter during the course of the argument by saying that if it becomes directly in point whether a prisoner was at a certain place on a certain day, he making the allegation that he was, it might be possible in those circumstances, the matter being directly in issue in the case, for the prosecution to show that he could not have been in that place on that day because he was serving a sentence of imprisonment at the time. But, generally speaking, apart from those exceptional and statutory cases, it is, in the judgment of the Court, quite clear that the prosecution cannot lead evidence to show that the prisoner was of bad character merely because he has attacked the evidence of the prosecution.

As I say, there are certain cases in which it can be done, and therefore I will deal with the second ground of appeal quite shortly. The second ground of appeal is that, even assuming the evidence of bad character was admissible, it could not be proved in the way in which it was proved in this case. In this case, the way in which it was done was that a police officer was called, who did not pretend that he knew the prisoner. All he could say was that, according to the records at Scotland Yard, the prisoner had so many convictions against him, and so on. That would be evidence which would be quite properly admissible, and we know it is received in every criminal trial, after verdict. What happens after verdict is very different from what happens before verdict. After verdict, there is no longer an issue between the Crown and the prisoner. The issue has been determined by the verdict of the jury and there is no more room for evidence except to inform the mind of the Court what the prisoner's previous history has been, if the Court desires to hear it, for the purpose of enabling the Court to assess the proper sentence. I, and no doubt my brethren have on occasions, had a case before us where one does not want to hear the evidence of character, because, whatever the evidence of character may be, the Court thinks the offence itself demands either a very

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small sentence, or even in some cases a very long sentence. There is no obligation on a Court to hear evidence after verdict. I may mention one small point which shows the distinction between evidence after verdict and evidence before the verdict. That is the different oath which used to be administered to the witness. We all know the form of the oath which was administered to the witnesses during the trial, "The evidence you shall give to the Court and jury sworn between our Sovereign Lord, the King and the prisoner at the bar, shall be the truth", and so forth. After verdict, the witness who came into the box to give evidence was sworn on what was called the *voire dire*, that is to say, "You shall true answer make to all such questions as the Court shall demand of you". The Court could then demand any information the Court saw fit to ask for. Indeed, if one goes back historically in these matters, one of the great complaints in Stuart times made against the Star Chamber was that the Star Chamber, unlike the Courts of common law, always claimed to examine the witnesses on the *voire dire*. That was one of the great objections the common lawyers had to that Court. The oath which the witness took *voire dire* was not an oath as to a matter in issue between the Crown and the prisoner; it was an oath to inform the Court truthfully in answer to its questions. It seems to me that there is no pretence for saying that if it becomes admissible and relevant, as it may in a certain limited class of case, to prove that the prisoner was of bad character, that a witness can be called to give evidence other than that which is strictly evidence according to the well-known rules which govern the giving of evidence in English Courts. It must be that to which a person can swear of his own knowledge, and to take the evidence of a police officer who knows the prisoner, who knows his habits and has seen him in the streets, is no doubt very proper evidence; but an officer who may be the proper person to come and tell the Court after conviction: "I have here a list of the prisoner's convictions" is not a person who can give evidence where it is a matter which may be proved, and which then must be proved, according to legal evidence.

The only other matter that arises in the case is this: As I have said, this was a serious and bad case. Certainly, it is a shocking thing that in the streets of the West End of London there should be a razor attack by one blackguard upon another. It is a matter for which a severe sentence ought to be given. The difficulty here is that, having regard to the nature of the defence set up, and the general circumstances of the case, we do not feel able to apply the provisions of the proviso to section 4 (1) of the Criminal Appeal Act and say that the jury would necessarily have come to the decision to which they came if this evidence had not been given. It was evidence upon a most vital matter, and when evidence is given with regard to the bad character of the prisoner which ought not to have been given, in my experience this Court has always quashed the conviction. In these circumstances, we feel that the conviction should be quashed and the prisoner discharged.

My brother Lynskey reminds me that it does sometimes happen that when a police officer is called after verdict, and reads out a prisoner's record, the prisoner disputes a conviction, or sometimes more than one conviction, and if he does that, the Court must either state that they ignore the disputed conviction or convictions, or the case must be put back in order that there should be proof by legal evidence. As a general rule, the records kept at the Criminal Record Office are so accurate that it is not often that the prisoner really does dispute a conviction. One also remembers that in many cases there is a count in the indictment that the prisoner has previously been convicted of felony, and in certain circumstances that has to be proved because the sentence may be much more severe. There are provisions in the statutes to which our attention has been called today which lay down that where there is a charge against a prisoner that he has been previously convicted of felony, the jury are not to be told about that until they have found him guilty upon the main charge; then, it is quite common form for the Clerk of Assize to address the prisoner and say: "There is a second count in this indictment which alleges that you were on

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such-and-such a date and at such-and-such a place convicted of felony; were you so convicted? ". If the prisoner says: " Yes, I was ", that concludes the matter. If he says: " No, I was not ", then the prosecution call an officer, or some other person who knows that he was convicted and was there when he was convicted, to prove the conviction.

On both grounds, therefore, this appeal succeeds and the prisoner must be discharged.

Conviction quashed.

Solicitors: W. R. Perkins, for appellant; Solicitor to Metropolitan Police, for the Crown.

BEFORE

MR. JUSTICE OLIVER, MR. JUSTICE CROOM-JOHNSON AND
MR. JUSTICE MORRIS.

PATRICK JOSEPH CASEY.

1947.
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*Insanity—Procedure—Prison Doctor to be Called by Defence—
Duty of Prosecution.*

Where the defence of insanity is relied on, the procedure that the defence should call any witness whose evidence is directed to that issue should be followed, the duty of the prosecution being limited to supplying the defence with a copy of any report or statement of any prison medical officer who can give evidence on that issue and to making such person available as a witness for the defence.

Appeal against conviction.

The appellant was convicted at Birmingham Assizes on July 21, 1947, of murder and was sentenced by Atkinson, J., to death.

At the trial the defence of insanity was relied on. The prison medical officer was put in the box by counsel for the Crown and tendered to the defence for cross-examination, and was cross-examined by counsel for the defence. Counsel for the defence called as a witness the medical superintendent of a mental hospital, who was cross-examined by counsel for the Crown.

R. C. Vaughan, K.C., and J. Silverman, for the appellant, invited the Court to act under section 5 (4) of the Criminal Appeal Act, 1907, and substitute a verdict of Guilty but Insane.

C. L. Henderson, K.C., and H. G. Talbot, for the Crown.

MORRIS, J. (after stating the facts): The course which was followed at the trial was that the prison doctor, who had examined and made a report on the appellant, was called as a

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witness by the prosecution. Mr. Vaughan, who appeared for the accused man, had been supplied by the prosecution with a copy of the prison doctor's statement and report, and was then able to cross-examine him. Later, Mr. Vaughan himself called a medical witness, who was cross-examined by counsel for the Crown. The course of having the prison doctor called as a witness by the Crown, in the sense that the Crown put him in the box so that counsel for the defence could ask him questions, was accepted by counsel for the defence; but complaint is now made of it because, says Mr. Vaughan, he did not expect that when later he called a medical witness that witness would be cross-examined by counsel for the Crown, and Mr. Vaughan suggests the jury may have been left in some perplexity.

While it is abundantly clear that counsel in this case both acted from the most commendable of motives, and while it was clearly right and proper that the prosecution should have given to the defence a copy of the statement of the prison doctor, and made arrangements so that he should be available in Court to be called as a witness, the appropriate course was for the defence to call any witness whose evidence was directed to the topic of the accused man's sanity, any issue in regard to which it was for the defence to raise.

In the course of the submissions made to this Court by Mr. Vaughan, attention has been directed to SMITH (OLIVER) (1910), 6 Cr. App. R. 19. In that case there was a discussion on the duty of counsel for the Crown with regard to tendering evidence of a prisoner's sanity. In the course of the argument and discussion the Lord Chief Justice (Lord Alverstone) said this (at p. 20): "The question came up seven or eight years ago, when a practice arose of the Crown calling the prison doctor to prove insanity. All the Judges met and resolved that it was not proper for the Crown to call evidence of insanity, but that any evidence in the possession of the Crown should be placed at the disposal of the prisoner's counsel to be used by him if he thought fit". In the result "The Court stated that the only general rule that could be laid down was

that insanity, if relied upon as a defence, must be established by the defendant". The fact that Mr. Vaughan has made the complaint which he has made in this case illustrates the difficulty and embarrassment which may result if there is a departure from the rule that it is for the defence to call the witnesses in relation to the topic of insanity. However well-intentioned and however inspired by a desire to be extremely fair may have been the adoption of a different course, it is clear, as this case shows, that it is desirable to adhere to the procedure that the defence should in the first place call any witness directed to the issue of insanity, if the defence raise that issue. Nothing that I have said is relevant to the question of the appropriate procedure and course of action where the issue is whether an accused person is or is not fit to plead.

[His Lordship then reviewed the evidence and the summing-up and stated that, in the opinion of the Court, there was no ground for interfering with the conviction.]

Appeal dismissed.

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BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS
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WILLIAM HERBERT SAMPSON.

1947.
Oct. 15.

Magistrates—Indictable Offence—Summary Trial—Duty First to Inquire into Prisoner's Character and Antecedents—Prisoner with Record of Previous Convictions—Judicial Discretion to be Exercised—Criminal Justice Act, 1925 (15 & 16 Geo. 5, c. 86), s. 24 (1).

It is the duty of magistrates, under section 24 (1) of the Criminal Justice Act, 1925, to inquire into a prisoner's character and antecedents before they decide to deal with an indictable offence summarily, and in the case of a prisoner with a criminal record, to exercise a judicial discretion in deciding whether the case may properly be dealt with summarily or not.

SHERIDAN (26 Cr. App. R. 1; [1937] 1 K. R. 228) and GRANT (1986), 26 Cr. App. R. 8, referred to.

Application for leave to appeal against sentence.

The applicant pleaded guilty at Penzance Quarter Sessions on July 18, 1947, to larceny in a dwelling-house and was sentenced by the Recorder to three years' penal servitude.

No counsel appeared.

THE LORD CHIEF JUSTICE: This applicant pleaded guilty at Penzance Quarter Sessions to a charge of larceny in a dwelling-house, a particularly mean class of offence, in that he got lodgings and stole from his landlady, and at his request two other cases were taken into consideration. He was sentenced by the learned Recorder to three years' penal servitude, which was an extremely proper sentence, having regard to his record. This case, however, does cause me to call attention to what, not for the first time, this Court has said for the guidance of magistrates. Section 24 of the Criminal Justice Act, 1925, which statute extends the power given to justices to try

indictable offences summarily, directs them to take into account, among other things, the accused person's character and antecedents, and it is difficult indeed to understand how any Court, at any rate, by the year 1943, still more emphatically by 1944, could have thought that it was right for magistrates to be dealing with this applicant summarily.

I will summarise his convictions. [The judgment then set out a list of ten convictions between 1939 and December, 1943, and continued :]

I do not hesitate to say that it was entirely wrong for any Court to deal with him summarily as late as 1943. He had conviction after conviction recorded against him, and, whether the amount involved was large or small, magistrates ought by that time to have sent him to be dealt with on indictment. Actually, he was charged with stealing money to the extent of £9, and one case of larceny was taken into account, and he was sentenced to six months' imprisonment. In December, 1943, again magistrates dealt with him, on a charge of stealing no less a sum than £50 as a servant, and again he received six months' hard labour. Having finished that sentence, he appeared at Exeter in June, 1944, apparently at the City Court, for stealing a wireless set as a bailee, and again was sentenced to six months' imprisonment. It is perfectly ridiculous to deal with thefts in this way; it is putting a premium upon them and putting the property of honest citizens in jeopardy. In December, 1944, he was again charged at the Exeter magistrates' Court with stealing a wireless set, and this time he was sentenced only to three months. Then, I suppose, a charge of larceny must have been preferred against him while he was still in prison because, although he had been sentenced in December for stealing a wireless set and sentenced to three months, in January, 1945, that is only a month later, he was again sentenced to three months for larceny. Having served that sentence, he went into the county of Wilts. and on May 17 was before the Wiltshire county magistrates at Trowbridge. There he was charged with stealing a pedal cycle, cigarettes and a lighter,

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and five other cases were taken into account. Again the magistrates dealt with him and sentenced him to twelve months. Then in March, 1946, as soon as he was released from serving the sentence to which I have just referred, he came before the magistrates at Weston-super-Mare for stealing £20 as a servant and also other cash and property, and three other cases were taken into account, and he was sentenced to a further three months. Then he reappeared in his old haunts at Plymouth in January, 1947, and was sentenced to six months' hard labour for stealing from a dwelling-house, another case being taken into consideration.

The Summary Jurisdiction Acts were never intended to deal with a prisoner with a record such as this. Fortunately, the Penzance magistrates sent him for trial. Had he been dealt with in that way years ago, many of these unfortunate people who lost their property would not have lost it. I do hope that magistrates will remember that it is their duty to inquire into a prisoner's character and antecedents before they consent to deal with him summarily. They have to take into account what the police say, but they ought not to be bound solely by the view of the police superintendent, who may want to get rid of the case quickly instead of having it sent to the assizes. Magistrates ought to exercise judicial discretion before they decide, in the cases of prisoners with records, whether they will deal with them summarily or not, and I do not hesitate to say that a long time ago magistrates ought to have refused to deal with this applicant, and ought to have sent him to quarter sessions or assizes. I believe some benches of magistrates feel the difficulty about inquiring into the prisoner's record. If they would carefully read the judgments of my brother Humphreys, which were given in the well-known cases of *SHERIDAN*, 26 Cr. App. R. 1; [1937] 1 K. B. 223, and *GRANT* (1936), 26 Cr. App. R. 8, they would see that this Court there pointed out that the statute requires magistrates to inquire into the character and antecedents of an accused person. The judgments point out that if the character is good or, at any rate, not bad, no harm will be done by the magistrates

knowing that fact before they proceed to adjudicate. On the other hand, if they are informed that an accused person has an exceedingly bad character, as in this case, again no harm is done, because their plain duty in such a case is to commit him for trial.

I hope that some notice will be taken of this case because it is a shocking instance of making a man, what I can only call, a victim of short sentences. In this case, the Penzance magistrates acted perfectly properly and sent the applicant to quarter sessions, and the learned Recorder dealt with him by a sentence of which no criticism can be made. The application is accordingly refused.

Application refused.

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BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS
AND MR. JUSTICE SINGLETON.

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Oct. 16.

JAMES KESSACK NICHOLSON.*

Sentence—Outstanding Offence Taken into Consideration—No Conviction in Respect of Outstanding Offence.

Opinion of the Court expressed that where on the conviction of a prisoner an outstanding offence has been taken into consideration by the Court at his request, there is not a conviction in respect of the outstanding offence, and that the decision in *McMINN* (1945), 30 Cr. App. R. 138, that in such a case there is a conviction in respect of the outstanding offence sufficient to establish a plea of *autrefois convict* ought not to be followed, at least until it has been considered by the Court of Criminal Appeal.

Application for leave to appeal against conviction.

The applicant was convicted at Devon Quarter Sessions on August 13, 1947, of larceny and was sentenced by the Chairman to two years' imprisonment.

No counsel appeared.

SINGLETON. J.: The applicant was convicted at Devon Quarter Sessions on a charge of larceny, a breach of recognisances was taken into consideration, and sentence of two years' imprisonment was passed upon him, to run concurrently with a sentence which he was already serving. He now asks for leave to appeal against conviction and for legal aid.

The ground which he raises is that when he was brought up before the magistrates at Hitchin on July 22 the offence

* This appeal was re-heard on December 18, 1947, by a Court consisting of HUMPHREYS, ATKINSON and OLIVER, J.J., who affirmed the present decision on the same grounds. A report of the later decision will appear in the next Part of this Volume.

with which he had been charged and of which he was subsequently convicted at the Devon Quarter Sessions was included in the list of outstanding offences which he admitted and asked to be taken into consideration. It is quite clear that that offence was not taken into consideration by the magistrates at Hitchin. At quarter sessions the applicant was represented by counsel, who told the Chairman: "I have in front of me a typewritten copy of a letter purporting to be sent by the prisoner on July 27 and he said in that letter that the magistrates at Hitchin gave him six months, and then after sentence the Chairman said he had not taken the charge into consideration". That the charge was not taken into consideration is clear.

The applicant also denied that he was guilty of the offence, which was that of stealing a tin containing £25 in notes and about £5 in silver from the porter's room at the Queen's Hotel, Torquay, during the evening of July 7. He was employed at an hotel quite near and there was ample evidence that he was the man who had taken the money. Over and above that, when he was interviewed at Hitchin, he confessed to the police that he had committed the offence and asked that it should be taken into consideration, but the magistrates declined so to do. After having on more than one occasion confessed to the offence, he set up then the defence that he was not the man and that he had been tricked into making a confession. There was clear evidence before the jury and they convicted the applicant. There is no ground whatever for giving leave to appeal against conviction.

In a report which the learned Chairman sent to the Court regarding this somewhat unusual case, he pointed out that it was distinguishable from *McMINN* (1945), 30 Cr. App. R. 138, in that in *McMINN'S CASE* (*supra*) the outstanding case had been taken into consideration, whereas in the present case the magistrates had refused so to do. It is all to the good that our attention has been drawn to *McMINN* (*supra*), for we are given to understand that the decision of Lewis, J., in that case has led to some difficulty, and it is not easy to see how it could

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ever be considered in this Court if it is universally followed in courts of trial. In that case the facts were these (I am reading from the report at p. 138): "The defendant was indicted before Lewis J. on January 24, 1945, at Northamptonshire Assizes for obtaining a cheque by false pretences. On being arraigned he entered a plea of *autrefois convict*. Evidence was called to prove the following facts: On September 26, 1944, the defendant appeared before the Stratford (Essex) petty sessional court charged with larceny. He consented to be dealt with summarily and the justices found the offence proved. He then asked that an outstanding offence of obtaining the cheque by false pretences in Northamptonshire, in respect of which he had signed the usual 'other offences' form, should be taken into consideration. The justices agreed to take this into consideration, and passed a sentence of six months' imprisonment. The defendant appealed to Essex Quarter Sessions against the conviction of larceny, and on November 30, 1944, Quarter Sessions allowed the appeal and quashed the conviction. The defendant was then arrested on warrant for the offence of obtaining the cheque by false pretences and committed to Northamptonshire Assizes for trial". Lewis, J., said (p. 141): "I have considered the point of law and I think that the plea in bar of *autrefois convict* succeeds. I shall direct the jury to return a verdict that the prisoner has been previously convicted. I have been referred to several cases, but I do not think there are any on all fours with this one". He so directed the jury and the accused man was acquitted.

We feel unable to agree with the opinion of the learned Judge. We recognise that the question has not been argued before us, but we think it right to point out that the taking into consideration of cases at the request of an accused person does not mean that there has been a conviction in each of such cases. For many years there has been a practice under which, when there are outstanding cases and the accused person has signed the usual form, those cases may be taken into consideration if after conviction the accused person admits

• them and wishes them to be taken into consideration. That practice was adopted largely to enable an accused person to start with a clean sheet when he was released from prison. It also avoided multiplicity of proceedings. Sentence is passed on the count or counts on which there has been a conviction, and no matter how many offences are taken into consideration, the sentence cannot exceed that prescribed by law for the offence upon which there has been a conviction. There is no conviction in respect of any of the outstanding cases, nor is there any separate sentence in respect of any of them. In the normal case no proceedings would follow upon any of them, for the reason that they had been taken into consideration, not because there had been convictions in respect of them. We think it is right to point this out to avoid misunderstanding, and though, as I have said, the question has not been argued before us, we have considered the arguments and the judgment in *McMINN'S CASE* (*supra*) and we are all strongly of opinion that it ought not to be followed in future cases, at least until it has been considered by this Court.

The application for leave to appeal against conviction is refused.

Application refused.

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BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS
AND MR. JUSTICE SINGLETON.

1947.
Oct. 20.

HENRY GORDON COOPER.
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Conspiracy to Steal—Other Counts Alleging Robbery and Larceny—Evidence of Robbery and Larceny—No other Evidence to prove Conspiracy—Whether Count for Conspiracy to be Included in such Circumstances—Verdict of Not Guilty of Substantive Offences but Guilty of Conspiracy—Convictions Quashed—Desirability of Court having Power to Order New Trial—Criminal Appeal Act, 1907 (7 Edw. 7, c. 28), s. 4 (1).

The appellants, who were police officers, were charged in the first count of the indictment with conspiracy to steal. In the next four counts they were charged with robbery, and in the last four counts, alternatively, with larceny, from four separate persons, the allegation of the prosecution being that they had used their position as police officers to force those persons to hand over money or goods as the result of threats and in some cases had actually stolen the money. There was no evidence to prove the charge of conspiracy except that of the four aforementioned persons and certain other persons who supported their stories. The jury found the appellants Guilty on the count which charged conspiracy, but Not Guilty on all the other counts.

Held, that as the verdict on the first count could be supported only if the jury believed the general story for the prosecution, and as by their verdict of acquittal on the remaining counts the jury must be taken to have disbelieved the general story, the convictions must be quashed on the ground that the verdict was unreasonable and one which could not be supported having regard to the evidence within the meaning of s. 4 (1) of the Criminal Appeal Act, 1907.

Observations of the undesirability of including a count for conspiracy in an indictment in such cases.

LUBERG AND OTHERS (1926), 19 Cr. App. R. 133 referred to.

Observations of the desirability of the Court having power to order a new trial.

Appeals against conviction.

The appellants were convicted at the Central Criminal Court on July 1, 1947, of conspiracy to steal and were sentenced by Lynskey, J., Compton to twelve months' and Cooper to nine months' imprisonment.

The appellants, who were officers of the Metropolitan Police, were charged also with robbery, and alternatively with larceny, from four named persons. On all these charges they were acquitted. The case for the prosecution was that in each case the appellants had accused the particular person of receiving stolen or otherwise unlawfully acquired property, and that by means of threats used in connection with their position as police officers they had persuaded the particular person to hand them over sums of money, or in some cases had actually stolen money and property from the person accused. Apart from the evidence of these four persons and certain other persons called to support their stories, there was no evidence of any conspiracy on the part of the appellants.

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G. D. Roberts, K.C., and V. Durand, for the appellant Cooper :

The verdict should be set aside as one that is unreasonable and cannot be supported having regard to the evidence within the meaning of section 4 (1) of the Criminal Appeal Act, 1907. By their verdict of acquittal on the last eight counts of the indictment the jury must be taken to have found that the evidence of the persons who said that they had been deprived of their money by the appellants was unreliable, and, apart from their evidence and that of certain other persons who supported their story, there was no evidence to support a charge of conspiracy to steal. Having discarded that evidence when considering the substantive charges, the jury could not reasonably rely on it when considering the charge of conspiracy; yet this is what the jury must have done, as no other intelligible meaning can be given to their verdict of Guilty of conspiracy. Further, the case was one in which there

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should have been a very clear direction by the Judge on what the jury must find before they could come to the conclusion that the charge of conspiracy was established, and the summing-up cannot be considered adequate on this matter.

John Flowers, K.C., and M. Waters, for the appellant Compton, adopted similar arguments.

E. A. Hawke, for the Crown :

It is by no means clear what the jury meant by their verdict. A verdict of Guilty of conspiracy to steal, but Not Guilty of larceny would in many cases be perfectly intelligible and proper and can be justified in this case on one construction of the jury's verdict. The jury may have believed that each of the four prosecutors was telling the truth with regard to the manner in which the appellants entered his premises and in which he was approached by them, and yet may have not been satisfied that the whole of the property was stolen by the appellants in each case. The jury may, therefore, have taken the view that it was safer to convict the appellants of conspiracy only—that is to say, of entering into an agreement to take property from the persons whose premises they visited as and when they had the opportunity.

HUMPHREYS, J. : These two appellants were tried at the Central Criminal Court upon an indictment which contained nine counts. The first count charged conspiracy to steal, quite a simple charge. The second, third, fourth and fifth counts alleged that in four separate cases with regard to four separate persons the appellants had been guilty of robbery, that is, forcing those persons to give their money or their goods as the result of threats and owing to fear. The next four counts charged them with simple larceny—that is to say, that in those same cases they had stolen the money of those four persons. The main ground of this appeal is put quite well in the notice of appeal. The jury found a verdict of Guilty on the first count, and a verdict of Not Guilty on each and all of the remaining counts. It is argued in support of

the appeals that in those circumstances a verdict of Not Guilty on the substantive counts 2 to 9 leaves the first count unsupported by sufficient, or any, evidence. In other words, the appellants take advantage of the language of section 4 (1) of the Criminal Appeal Act, 1907, which provides that the verdict of a jury may be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence.

The jury had to consider the facts of the four separate cases. There was no other evidence in any case except that of those persons who were called in each of the four cases to support the case for the prosecution, and in each case it was substantially the same story. It was said by each one of these four persons, who were all foreigners or had been foreigners, that the two appellants, who are police officers of considerable length of service and, of course, of good character, because nobody remains in the police force unless he is of good character, came to the premises of the particular individual who may be called the prosecutor in that particular case, made some allegation as to that person's conduct, saying that he was suspected of receiving stolen property or uncustomed property, or something of that nature; and that the appellants took advantage of their position as senior police officers dealing with a man who was a foreigner, not a very high class person, to induce that person to hand over money to them for their own purposes or, in some cases, actually took from the person of that individual his wallet and stole the money which he had upon him. It was also alleged that they stole goods.

The case for the appellants is that, that being the whole of the evidence, because there was no other evidence at all except that of those four persons and such other persons as could support their story, when the jury found a verdict of Not Guilty, as they did in each and all of those cases, there was nothing left to support any other charge against the appellants.

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It may be observed that the appellants, being police officers, were authorised to do many things which they did which otherwise would have been very suspicious and perhaps even illegal, for instance, going into a person's premises and insisting upon seeing his property and his books, and so forth. *Prima facie*, that is a perfectly lawful act on the part of a police officer who is desirous of making an investigation about a suspected person. There was therefore very little in dispute between the two appellants on the one hand and the various prosecutors on the other. There was no dispute as to identity. There was very little dispute as to the circumstances in which the appellants entered the premises and discussed with them certain aspects of the criminal law, suggesting that either un-customed goods or stolen property was the subject of their investigations. Where the prosecutors on the one hand and the two appellants on the other hand differed absolutely and completely in their evidence was in the allegation that the police officers took away valuable property, money and various other things, from those persons for their own purposes. The answer of the appellants in three out of the four cases was that they took away nothing whatever, but in one case they agreed that they did take away some stockings which the particular prosecutor said he was thinking of buying. They said that they did so not because they were in a position to make any charge against that particular man, who was named Godel, but because Godel himself said: "I do not want these stockings; if they are going to get me into any trouble, I will not have them, I will not buy them, and I would rather you took them away", and they therefore took them away to return them to the person whose property they were. In the other cases they simply said: "The story that we took this man's money or goods is a lie". That was the issue which the jury had to try, and the appellants contend that, the jury having found that they did not believe those stories of the prosecutors, there is no evidence left to support a charge that they entered into any unlawful agreement to steal or to do anything else

unlawful. At first sight, it seems very difficult to see any answer to that argument on the part of the appellants.

The principal argument which Mr. Roberts, supported by Mr. Flowers, has addressed to the Court is this: The difficulty here arose from the fact of there being a charge of conspiracy. If the jury believed the story of the four stealings, then of course there was plenty of evidence of conspiracy. Nobody complained at the trial, and the learned Judge and everybody agreed, that if there was a conviction upon the counts for larceny, there would be a conviction on the count for conspiracy, although it really added nothing to the strength of the case. It is obvious that if the two appellants in four cases were guilty of going into the offices or rooms of foreigners and stealing their money, they did not do so in any case by chance or under a sudden temptation, but as a result of a plan which they had formed, and that plan is properly termed in legal language a conspiracy to steal. But, on the other hand, if the story of the appellants is accepted, not only as to that part which alleges that they had, as in truth they had, authority to go where they did go, but also as to that part of it where they denied that they took away anything at all which did not belong to them, then there is absolutely nothing left, and the conspiracy to steal must fall with the charges of stealing.

Some observations have been made about the summing up of the learned Judge. In our opinion, there was no misdirection by the learned Judge, and there is no ground for criticism of the way in which this case was tried. When the learned Judge came to sum up, he told the jury that the first count was one of conspiracy to steal, and that there was nothing more to be said about it. After telling the jury the nature of the very simple charges in the four cases which followed, he proceeded to deal with the evidence. Finally, having directed them on the facts, by way of summarising his observations, the learned Judge said: "Those are the whole of the facts. You have to consider first of all whether you accept the evidence of the prosecution. Are you convinced by the

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evidence that what the prosecution say substantially happened? You cannot expect a man after a lapse of time to remember every detail exactly, but are you satisfied by the evidence of the prosecution that what they say substantially happened? If you are, then you will probably have little difficulty in coming to a conclusion that these men were working in agreement". That is all that he said upon conspiracy. It is not to be wondered at that the learned Judge did not think it necessary to say more, because it must have been so apparent, one would think, to anybody that that was not only the law but also the commonsense of the matter. If the story of the prosecution was proved, there was conclusive evidence of conspiracy. It seems to follow as a natural result that if the jury did not accept the evidence of the prosecution, there was no evidence of conspiracy. True, the learned Judge did not say so in terms, but the jury might be expected to understand that that corollary followed as a matter of course, that while there was conclusive evidence of conspiracy if the case for the prosecution was accepted, there was no evidence of conspiracy if the case for the prosecution was not accepted.

The jury, after a very substantial retirement lasting something like a couple of hours, came back and, on being asked whether they were agreed on their verdict, replied: "On one count only there is agreement". The learned Judge, if he had thought right, might have said: "Very well, then, I will take your verdict on that one count on which you are agreed, and we will see whether there is any use in sending you back to consider the matter on the other counts". He did not take that course, but after most properly saying to the jury that he did not want them to tell him from what it was that their trouble arose, or anything of that sort, he told them that they had better retire and see whether they could or could not agree on the indictment as a whole. The jury again retired, and they made it plain before they retired that their trouble was concerned with the word "conspiracy". They asked whether they had rightly understood the learned Judge to say "that the definition of 'conspiracy' was an agreement to do

an unlawful act or to do a lawful act unlawfully". The learned Judge's answer was: "That is the definition of 'conspiracy', but the particular conspiracy which is charged in this case is a conspiracy to commit the unlawful act of stealing". It must, therefore, have been present to the minds of the jury, if they followed that plain direction, that conspiracy to steal must be proved and not an agreement to do something else which was unlawful. The jury finally returned half an hour afterwards and returned a verdict of Guilty on the first count and Not Guilty on each of the others. The learned Judge then said to counsel for the defence: "As I understand the verdict, Mr. Flowers, what they have found is that there was a conspiracy existing between these two men to steal in the course of their duties, but that they are agreed, so far as the particular instances before the court are concerned, that conspiracy was not in fact carried out", and counsel for the defence said that that was the way he understood the verdict.

That is the way in which the verdict has been construed in this court, and it may be that it is correct, but this Court takes the view, and always has taken the view, that we are not prepared to speculate on what a jury meant by a verdict which they have returned. We can only deal with the actual language used by the jury in returning the verdict. In the course of the argument a number of theories have been put forward on what the jury may have thought. We do not join in that speculation. All we can say is that the jury have said in terms: "We are not satisfied with the case for the prosecution on counts 2 to 9. We are satisfied with the case for the prosecution on count 1", and they returned verdicts accordingly.

Now is it possible that this Court can uphold that verdict as being a reasonable one? In a great many cases there is no doubt at all that a verdict of Guilty of conspiracy but Not Guilty of the particular acts charged is a perfectly proper and reasonable one. In such cases it would be very wrong not to insert in the indictment a charge of conspiracy. Criminal lawyers know that often while a general conspiracy, for

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example, a conspiracy to steal, is likely to be inferred by the jury from the evidence, it may be that the evidence of the particular acts forming the larcenies, which are charged in the indictment, are supported by rather nebulous evidence. In such a case the jury may say, and very likely will say, Not Guilty of larceny, but Guilty of conspiracy to commit larceny.

It was said in the judgment of this Court in *LUBERG AND OTHERS* (1926), 19 Cr. App. R. 133, that difficulty had arisen in that case as the result of including a count for conspiracy together with a number of counts charging particular offences against that section of the Larceny Act, 1916, s. 32, which makes it an offence to obtain goods by false pretences. Sankey, J., as he was in those days, said this at p. 136: "But we do desire to say one word about the whole indictment. It will be observed that it starts with the general count for conspiracy. I am far from saying that that is wrong. It is perfectly open to prosecutors to do that, but it does, in our judgment, place the defendants in a case like this in some difficulty. The reason is that it renders admissible evidence of what one prisoner says in the absence of the others, because if they are all conspirators, what one of them says in furtherance of the conspiracy would be admissible evidence, even though it was said in the absence of the other conspirators. This is not only my own opinion. There is the well-known case of *BOULTON AND OTHERS* (1871), 12 Cox C. C. 87, where Cockburn, C.J., in summing up, refers to this procedure and says (at p. 93): 'I am clearly of opinion that where the proof intended to be submitted to a jury is proof of the actual commission of crime, it is not the proper course to charge the parties with conspiring to commit it, for that course operates, it is manifest, unfairly and unjustly against the parties accused; the prosecutors are thus enabled to combine in one indictment a variety of offences, which, if treated individually, as they ought to be, would exclude the possibility of giving evidence against one defendant to the prejudice of others, and deprive defendants of the advantage of calling their co-defendants as witnesses'. It is perfectly true that that case was

different from the present one. It is equally true that since the decision in that case an Act of Parliament has been passed which enables a prisoner to go into the witness-box and give evidence. It is a perfectly admissible and proper course to pursue, and a course which is often pursued, but we think that if that course is pursued, great care and great caution is necessary during the hearing of the evidence to be quite sure that no evidence is given which is inadmissible, and great care is required in the summing-up to keep all the several issues perfectly clear."

In this case it appears to us that there was no necessity from any point of view for the insertion of any charge of conspiracy. A verdict of Guilty could be supported only if the jury believed the general story, and the general story was one told by four different persons, each of whom, if he was believed, proved conclusively a charge of stealing which, from the point of view of the punishment, is actually a more serious offence than that of conspiracy, and it is owing to the insertion of that count that this trouble has arisen. Counsel for the prosecution was doing his duty in considering whether it was desirable or not to insert a count for conspiracy in this indictment. He thought that it was. In a similar case in future counsel for the prosecution who is instructed to draw the indictment will probably think, and think very long, before he clogs a perfectly simple case of stealing in one or more instances with a count for conspiracy, because it is so well known that juries not infrequently fail to understand what the lawyer finds so simple to understand, the difference between conspiracy and larceny.

No blame can be attached to the learned Judge for not saying what might have been said in this case, and what no doubt would have been said if it had occurred to the mind of anybody that the jury would return a verdict of Guilty of conspiracy but Not Guilty of doing the things which they found the appellants Guilty of conspiring to do. The count for conspiracy, being the first count in the indictment, was treated as the principal count. In our view that count was

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unnecessary in the facts of this case and is responsible for the difficulty which has arisen.

The powers of this Court are confined. We have power to deal with and to quash any verdict which is unsatisfactory, if it is a verdict of Guilty. We cannot deal with any acquittal by a jury on the ground that on the evidence it is wrong or unsatisfactory. Therefore, we are bound to accept the verdict of Not Guilty upon counts 2 to 9. In our view, it is impossible for us to say, having accepted those verdicts, which certainly were verdicts which the jury were entitled to return, that there remained any evidence at all on which the jury could in law return a verdict of Guilty upon the charge of conspiracy. The presiding Judges in this Court from the very first year in which the Court came into existence, and throughout the many years that have passed since then, have said over and over again that in order to do justice in certain cases, not often but occasionally, it is essential that the Court should have power to order a new trial. That power has never been given to the Court. Whether it ever will be, we do not know. In this case it would be the most satisfactory solution of this difficult position. The jury have said by their verdict that they are satisfied that the two appellants are rogues and unfit to be police officers. They have also said something which is so inconsistent with that finding that we find it necessary to quash these convictions. That is not a satisfactory state of affairs. Another jury hearing this evidence might—and it might be hoped would—come to some conclusion, either of Guilty or Not Guilty, upon these perfectly simple charges which would be satisfactory as enabling everyone to know what was their real view about the conduct of the appellants. As it is, we cannot take that course. All we can say is that the appellants have made out that which they set out to prove, namely, that the verdict in this case was so unreasonable that it cannot stand, and therefore—I quote the exact words of section 4—“that the verdict should be set aside on the ground that it is unreasonable and cannot be supported having regard to the evidence”, that is, with the view of the evidence formed

by the jury and stated by them in their verdict of Not Guilty on counts 2 to 9. The convictions are, therefore, quashed.

Convictions quashed.

Solicitors: Philip Conway, Thomas & Co., for the appellant Cooper; T. J. Robinson & Son, for the appellant Compton.

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BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS
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Innkeeper—Refusal to Supply Refreshment to Traveller—Reasonable Excuse—Question of Fact for Jury—Right to Retain Food—Right to Accept Bookings in Advance.

The common law duty of an innkeeper is to supply a traveller with food and lodging, unless he has reasonable excuse for refusal. What is a reasonable excuse is a question of fact for the jury.

An innkeeper is not bound, as a matter of law, if he has no food in the house, to send out and procure it, nor is there an absolute obligation on an innkeeper to supply food if he has it in the house, and a jury are entitled to consider the needs of travellers who are expected to arrive later in the day, of persons staying in the inn, and of the innkeeper's own family and servants, in deciding whether the refusal to supply food which was in the house was, in the circumstances, reasonable.

An innkeeper is not allowed to pick and choose his guests, but he is not prohibited from reserving tables for prospective guests and refusing to supply persons who have not made reservations in advance, even though he has food in the inn, nor can it be held as a matter of law that by so doing he is failing to conduct his inn according to his common law obligations, unless the jury find that in all the circumstances he acted unreasonably in refusing.

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Appeal against conviction.

The appellant was convicted at Essex Quarter Sessions on June 7, 1947, for that he, being an innkeeper, refused to supply refreshment to a traveller, and was sentenced by the Chairman to a fine of £1.

The appellant was the keeper of an inn known as The Cock Hotel, Epping, and on Sunday, April 27, 1947, one Robert Sidney Reach, who was admittedly a traveller, went with his wife to the inn and asked for lunch. The waiter whom they saw there asked if they had booked, and on being told that they had not, he said that his orders were not to serve anybody who had not previously booked. At the time luncheon was being served, but the dining room was not full and there were vacant places. The manageress, the appellant's wife, was called and she confirmed the refusal to supply Mr. and Mrs. Reach with lunch in the dining room as they had not already booked a table. There was a conflict of evidence whether other refreshment was offered. Mr. Reach said that he and his wife asked if they could have some sandwiches, but the appellant's wife refused to supply these; the appellant's wife and another witness for the defence said that sandwiches were offered by the appellant's wife but were refused by Mr. Reach. There was at the time in the inn more than sufficient food for luncheon, as the appellant was reserving some for the evening meal and for next morning's breakfast. The material portions of the summing-up and of the Chairman's rulings on matters of law appear in the judgment.

G. O. Slade, K.C., and *C. E. Rochford*, for the appellant :

The conviction cannot be regarded as satisfactory. The real issue for the jury was a simple one of fact—was the refusal of the appellant to supply Mr. Reach, who admittedly was a traveller, with food in all the circumstances reasonable? This, however, must have been obscured in the minds of the jury because at various stages of the case, and in his summing-up, the Chairman gave what amounted to rulings in law on various matters which had arisen in the case. These rulings

were not all correct in law, and questions which should have been treated as questions of fact were treated as questions of law. During the course of the opening speech for the defence, defending counsel said: "All that an innkeeper has to do is to act reasonably. He is not under an absolute obligation to provide a traveller with food" which, it is submitted, as a statement of the law was quite unexceptionable. Yet the Chairman interposed: "I shall tell the jury that he is" and added that if the innkeeper either had food, or was able to procure food, his obligation was absolute. That, it is contended, was an incorrect proposition of law and must have misled the jury. Further, when the appellant was giving evidence, the Chairman entered on a discussion of the right of an innkeeper to reserve tables beforehand for prospective guests, and intimated that there was something improper and inconsistent with his common law obligations as an innkeeper in his doing so. It is conceded that an innkeeper has no right to "pick and choose his guests": *BROWNE v. BRANDT*, [1902] 1 K. B. 694, 696: but to suggest that an innkeeper is doing this merely because he has reserved tables beforehand is an incorrect statement of law, especially when the evidence was that the persons for whom the tables had been booked were coming from a distance and were, therefore, travellers. In the result, although some portions of the summing-up stated the law and the issues for the jury quite correctly, the introduction of all these other matters must have confused the jury's minds on the question what were the real issues before them.

H. T. Buckee, for the Crown:

The case was complicated by the fact that there was a conflict on a serious issue of fact, namely, whether the appellant offered to supply Mr. and Mrs. Reach with sandwiches or not. In dealing with this matter the Chairman put the case for the appellant as favourably as it could be put by telling the jury that, if they took the view that the appellant did offer sandwiches, the case must end in an acquittal. It is conceded that in some of the interlocutory observations which the Chairman made he did put the common law duty

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imposed on an innkeeper too high, but the summing-up, regarded as a whole, put the matter fairly, and towards the close the issue was stated quite clearly: did the defendant refuse reasonable refreshment to Mr. and Mrs. Reach? It is quite clear from the decision in *BROWNE v. BRANDT* (*supra*) that an innkeeper is not entitled to "pick and choose his guests", and the reservation of tables over the telephone, to the detriment of ordinary travellers, may amount to picking and choosing. It is really a question of degree, and that is, in substance, what the Chairman told the jury.

G. O. Slade, K.C., replied.

Cur. adv. vult.

Nov. 3.—The judgment of the Court was read by:

THE LORD CHIEF JUSTICE: The appellant in this case was convicted at the Quarter Sessions for the county of Essex of a common law misdemeanour. The indictment charged that he, being an innkeeper, refused to supply refreshment to a traveller contrary to the common law, and the particulars of the offence given were that on a certain date in April, 1947, he, being the keeper of an inn known as The Cock Hotel, Epping, without lawful excuse refused to supply the prosecutor with refreshment for which he was willing to pay. The appellant now appeals to this Court on the ground of misdirection.

Except on one point the facts were not in dispute before us. The appellant was admittedly an innkeeper and it is not disputed that the prosecutor, one Robert Sidney Reach, was a traveller. On a Sunday last April, Mr. and Mrs. Reach went to the appellant's inn and asked for lunch. The waiter whom they saw asked them if they had booked, and on being told that they had not, he said that his orders were not to serve anybody who had not previously booked. At this time luncheon was in progress of being served. The dining room was not full and there were vacant places at tables. The manageress, who is the wife of the appellant, was called and she confirmed the refusal to supply them with lunch in the dining room as they had not already booked a table. The

matter which was in conflict between the prosecution and the defence was that whereas the prosecutor said that he and his wife asked if they could have some sandwiches and Mrs. Higgins refused to supply them, Mrs. Higgins, supported by another witness, said that she offered sandwiches and they were refused. There was no question but that there was food at the time in the inn and more than enough for luncheon. The appellant was reserving some of the food he had in his house for the evening meal and for next morning's breakfast. Those are all the facts that appear to the Court to be material.

Now there is no doubt as to the obligation of an innkeeper. He is bound to supply a traveller with food and lodging which he cannot refuse without reasonable excuse. It matters not that the word "lawful" was used in the indictment, for a reasonable excuse is a lawful excuse. What is a reasonable excuse is eminently a question for the jury, and had this case merely left these facts to the jury with the direction that it was for them to find whether the excuse put forward by the appellant was one which in all the circumstances was reasonable, there would have been no ground for interfering with the conviction if the jury saw fit to convict. Unfortunately, a great many other matters were introduced in this case with regard to the right of an innkeeper to accept bookings for meals and also with regard to his right to run his inn as a restaurant, as it was called, and Mr. Slade's main argument was that the directions which were given to the jury on these points were not only inaccurate in law but also tended to confuse the simple issue which the jury had to try. We say at once that in some parts of his summing-up the learned Chairman gave quite accurate directions to the jury, but there are other passages to which we think exception can properly be taken. The first matter to which Mr. Slade called attention was that during the course of Mr. Rochford's opening speech for the defence several interlocutory observations were made by the Chairman which he contends would give the jury a wrong impression of the law on the subject and of the case which they had to try. The first passage to which Mr. Slade

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took objection was that when Mr. Rochford in his address to the jury said: "All that an innkeeper has to do is to act reasonably. He is not under an absolute obligation to provide a traveller with food", the learned Chairman said: "I shall tell the jury that he is", but then went on to say: "If he", that is the innkeeper, "has no food in the house and is unable to procure food, the maxim *lex non cogit ad impossibilia* would apply. But, given that the man is a traveller, given that the innkeeper has not an absolutely full house, given that the innkeeper has food, or is able to procure food, then the obligation is absolute". No doubt the jury would pay a great deal of attention to an observation of that sort which was made by the Chairman in the course of counsel's opening speech for the defence, and in our opinion that is not an accurate statement of the law. In the first place, an innkeeper is not in our opinion bound as a matter of law if he has no food in the house to send out and procure it, a somewhat difficult task on a Sunday. No doubt if a jury thought that an innkeeper was not making provision for such guests as he might reasonably expect, they might say that he had acted unreasonably, but we think it is far too wide a statement to say that he is bound to supply food if he can procure it. Again, we are unable to agree with the learned Chairman that the obligation is absolute if the innkeeper has food in the house. A jury might well think that it would be reasonable for an innkeeper to say at any particular time: "I cannot give you food now. True, I have food in the house, but I have to consider the travellers who may come later in the day, I have to consider the people who may be staying in the hotel, the requirements of my own family and servants and more particularly on a Sunday the provision of breakfast on Monday morning". Those are matters which the jury can fairly take into consideration on the question whether a refusal is reasonable or not.

A little later on the Chairman emphasised this matter by saying: "They", that is travellers, "can say to the innkeeper: 'I am a traveller. You must supply me with food'.

The innkeeper then says: 'I have not got any food' and the innkeeper is committing no offence. But if the innkeeper has any food and he will not supply them, and if they are prepared to pay for it, he is committing an offence.' From what we have already said it will be seen that the Court cannot agree with so wide a statement as to the innkeeper's obligation, yet the jury would have to consider the appellant's evidence in the light of that observation by the learned Chairman.

It is perhaps a matter to remember that the evidence in this case was that the people who had booked tables for lunch at the appellant's inn on the day in question were coming from a distance and were not living in the immediate neighbourhood of the inn. The latter would of course not be travellers, and it may well be that an innkeeper is not entitled so to arrange his affairs that he can supply residents in his town or village, who may find it more convenient to lunch or dine at an inn than in their own homes, with the result that he is not able to supply legitimate travellers who require refreshment on their journey. In the days when the liability of innkeepers was first laid down, such conveniences as telephones and such restrictions as are imposed by rationing orders did not exist, and while we agree that an innkeeper is not allowed, in the words of Lord Alverstone, C.J., in *BROWNE v. BRANDT* ([1902] 1 K. B. 694, at p. 696) to pick and choose his guests, we cannot think that that phrase applies to the case where a number of travellers give notice to an innkeeper by telephone or letter that they will be calling at his inn for a meal and he has provided for them. If in such a case an innkeeper were to say to a casual traveller who arrives: "Such food as I have I am keeping for other travellers who have already intimated that they are on their way and I am afraid I have none left for you", a jury might well find the refusal to be reasonable.

Then when the appellant was giving evidence, many questions were put and discussions arose as to whether it was legitimate for an innkeeper to book tables for people who had

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intimated their intention of coming for a meal. It was said that by so doing the defendant was running a restaurant and not an inn, and in the opinion of the Court during the cross-examination the learned Chairman obviously intimated to the jury that there was something improper or illegal in an inn-keeper booking tables. We are unable to agree with this view. We see no reason whatever why an innkeeper should not book tables, nor is it to be said as a matter of law that by so doing he is failing to conduct his inn according to his common law obligations. He is not bound to supply, as indeed the learned Chairman pointed out, any particular sort or class of meal or in any particular room. The whole question is whether or not a refusal, if it was made, was in all the circumstances of the case reasonable.

When we come to the summing-up, many passages in it are quite unexceptionable and indeed correctly stated the issue for the jury. At an early stage the Chairman, having told the jury that the first questions which were really not in dispute were whether the appellant was an innkeeper and the prosecutor a traveller, said that "the third question is: Did Mr. Higgins refuse to supply some reasonable refreshment to Mr. and Mrs. Reach? And the fourth question is: Was that refusal an unreasonable refusal?". If those simple questions had been left to the jury without the complications as to the booking of tables and allocating food for one meal or another, and the jury had taken the view that the refusal in this case was unreasonable, this Court would have seen no reason to interfere. The difficulty is that so much was said in the course of the case with regard to other matters that we think the issue which was left to the jury in fact was far from clear, and it appears to us that the real objection to the directions given by the learned Chairman is that so many matters were treated as if they were matters of law while in truth they were nothing more than questions of fact. More particularly, the matter referred to constantly by the Chairman is the allocation of food to particular meals. We repeat, it cannot be said as a matter of law that an innkeeper is not entitled

to refuse to allow the whole of his provisions in the inn to be consumed at what is usually called luncheon time, or that he is doing anything wrong if he keeps provisions for those he may reasonably expect in the evening or for the requirements of himself and his family.

In the course of his summing-up the learned Chairman dealt fully and satisfactorily with the question whether or not sandwiches had been offered and refused or demanded and refused. Indeed, he went so far as to say in the course of his summing-up that if sandwiches were offered and refused that was an end of the case. That really was putting the matter too favourably for the defence, for it would be for the jury to say, if the sandwiches were offered, whether that amounted to an offer of reasonable refreshment. Such refreshment might in some cases be considered reasonable and in others totally inadequate. Mr. Slade was inclined to say that he must assume that the jury found that sandwiches were not offered but were asked for and refused. The Court does not feel able to assume that that was the opinion of the jury, because it was pointed out to them that there was still the question whether sandwiches would be reasonable refreshment. If the only question was whether the offer was made and refused, we are unable to understand why the luncheon menu was handed to the jury on their retirement as a matter for them to take into consideration. This menu showed what in these days must be considered a most attractive lunch. The Chairman had told the jury earlier in the case, and in our opinion quite rightly, that the prosecutor was not entitled to demand that lunch. By handing the menu to the jury it may well be they thought they were invited to consider whether an offer of sandwiches could be a reasonable refreshment having regard to that which more fortunate people who had booked tables would be able to get in the luncheon room, and this seems to us considerably to lessen the weight of the perfectly accurate direction which the Chairman gave when he said: "If they were offered sandwiches, then you must

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ask yourselves whether sandwiches were a reasonable refreshment. If you come to the conclusion that they were offered sandwiches, and that sandwiches were reasonable refreshment, then you will find Mr. Higgins Not Guilty". Towards the close of the summing-up the Chairman said: "Now, members of the jury, Mr. Higgins was called, and it is quite clear that he has got the wrong idea about his obligations as an inn-keeper. He is under the impression that he can pick and choose his guests. He cannot. He is under the impression that he can say: 'I will serve people who have booked my tables, but, having booked up all my tables, I will not serve anybody else, even if I have food in the house'. He cannot do that, because that would be picking and choosing". In our opinion, that is again stating the matter far too broadly. There cannot, as a matter of law, be anything wrong in an innkeeper saying that he will serve people who have booked tables and will not serve anybody else even if he has food in the house, unless on a full consideration of all the facts the jury thinks such a refusal is unreasonable. He can book tables, at least there is nothing illegal in his doing so, he is not obliged in our opinion as a matter of law to serve the last crumb of food in his house to any traveller who may arrive at any moment. If he knows or reasonably expects that in the evening other travellers will be arriving, he surely is entitled to keep food for an evening meal.

The summing-up concluded in this way: "The third question is: Did the defendant refuse reasonable refreshment to Mr. and Mrs. Reach? ". That was a perfectly proper direction. Unfortunately, the Chairman added: "And the fourth question is: In all the circumstances, taking into consideration the rationing difficulties, taking into consideration that he could buy fish and poultry, was such refusal reasonable? ". That, we think, was introducing an irrelevant consideration. To put it in that way, and at the same time to hand the jury the menu might, we think, well lead the jury to say that even if an offer of food was made it could not have been reasonable because it was said that he could

go out and buy fish and poultry which he certainly was under no obligation to do.

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In our opinion, so many extraneous circumstances were imported into this case, and so many matters were treated as questions of law which were nothing but questions of fact, that we think the only safe course is to quash the conviction. In truth, this case raises no new question, nor do we desire to lay down any new or particular doctrines of law with regard to the liability of innkeepers as to the supplying of food or refreshment to travellers. We do think that the case may have given the impression that an innkeeper is doing something wrong if he books tables for prospective guests. There is nothing wrong in his so doing. It may also have given the impression that an innkeeper is bound to use up the whole of the food in his house at any particular time that a traveller may arrive and ask for refreshment. Again, we cannot agree that that can be laid down as a matter of law. All these are mere matters which go to the reasonableness or unreasonableness of the innkeeper's conduct if he does refuse to supply a particular traveller, and are questions solely for the jury. What is reasonable depends upon all the circumstances of the case, and while, as we have said, we think that in many passages the learned Chairman gave correct direction to the jury, we think that a wrong impression may have been given to them and they may have understood that such matters as we have just referred to must be regarded as unreasonable conduct on the part of the innkeeper, and it is for that reason that we quash the conviction.

Conviction quashed.

Solicitors: J. E. Lickfold & Sons, for the appellant.

CIRCUIT CASE. [WESTERN CIRCUIT.]
 CORNWALL AUTUMN ASSIZES.

BEFORE

MR. JUSTICE LEWIS.

1947
 Oct. 31.

WILLIAM SHARROCK AND OTHERS.

Indictment—Committal for Trial—Defendant Still Untried Called by Prosecution against Defendants Charged with Different Offence—What Amounts to Giving of Evidence—Indictment Quashed.

Five defendants appeared before examining justices, one being charged with stealing property and the others with receiving the same property. During the course of the case for the prosecution the alleged thief and one of the alleged receivers were called into the witness-box to give evidence, but, on each being warned that he need not say anything which might tend to incriminate him, the alleged thief declined to give evidence, and the alleged receiver said that he stood by a statement which he had made to the police and declined to say more. All five defendants were committed for trial.

Held, that it was not competent for the prosecution to call persons against whom proceedings were pending and who were still untried to give evidence against their co-defendants, and that the mere fact that each of these persons was called into the witness-box and took the oath of a witness amounted to giving of evidence by him. Consequently, the committal of all the persons charged was bad and the indictment must be quashed.

GRANT AND OTHERS (1944), 30 Cr. App. R. 99, followed.

Motion before Lewis, J., at Cornwall Assizes, on October 31, 1947, to quash an indictment on the ground that the purported committal for trial was invalid.

Five defendants named Sharrock, Keast, Rundle, Lakeman and Jacobs appeared before examining justices holding the preliminary investigation into indictable offences. Sharrock was charged with stealing certain property, Keast and Rundle with receiving the property from Sharrock, and Lakeman and

Jacobs with receiving it from Keast. During the course of the case for the prosecution Sharrock and Keast were called into the witness-box by the prosecutor and sworn. Each in turn was warned that he need say nothing which tended to incriminate him. Sharrock declined to give evidence, and Keast merely said that he stood by a statement which he had made to the police. All five defendants were committed for trial. At the trial defending counsel moved to quash the indictment on the ground that the purported committal was bad, and that accordingly section 2 (2) of the Administration of Justice (Miscellaneous Provisions) Act, 1933, had not been complied with.

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J. C. Perks, for the defendant Sharrock :

To call as a witness for the prosecution before examining justices a defendant who is still untried is against the principles of natural justice and invalidates the committal. There is authority to this effect in *GRANT AND OTHERS* (1944), 30 Cr. App. R. 99.

H. E. Park, for the defendants Keast and Lakeman :

The ancient common law, declared in section 3 of the Evidence Act, 1851, prohibited any attempt to examine or cross-examine a party accused. Therefore, when the prosecution desire to obtain the testimony of one defendant against his co-defendants, an end must be put to the proceedings against that defendant either by his pleading Guilty on arraignment, or by the prosecution entering a *nolle prosequi* or by a verdict of acquittal. [He referred to *Taylor on Evidence*, 12th ed., p. 855; *Archbold's Criminal Pleading, etc.*, 30th ed., p. 468.]

C. Besley, for the defendant Rundle, and *F. S. Laskey*, for the defendant Jacobs, associated themselves with the above arguments.

H. Collins, for the prosecution :

In *GRANT AND OTHERS* (*supra*) what Birkett, J., held to be objectionable was the giving of evidence by one co-defendant still untried against another. In the present case the

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co-defendant virtually did no more than go into the witness-box and take the oath, and that does not constitute such "giving of evidence" as must render the committal bad.

LEWIS, J. : In this case a motion is made by counsel for the five defendants to quash the indictment on the ground that the committal for trial is bad, and my attention has been drawn to GRANT AND OTHERS (*supra*), which was a decision of Birkett, J., at Birmingham Assizes.

In the present case it is said with truth that when the five accused men who are now standing in the dock were before the examining justices, Sharrock on a charge of stealing and the other four on charges of receiving either from Sharrock or from each other the goods alleged to have been stolen by Sharrock, the prosecution thought it right, in order to prove their case, to call Sharrock and Keast into the witness-box. Sharrock, having been duly sworn, was given the proper warning that he need not answer any question which tended to incriminate him, and then said : " I decline to say anything, having been told I need not do so ". When Keast was called, having taken the oath and having also been warned, he said : " I do not wish to give evidence against Jacobs. I have made a statement to the police and I wish to stand by it. I have nothing to say, having been warned that I need not do so ". With regard to Keast's evidence, it is said that, unlike Sharrock, he did say something which was against his co-defendants in that he stated that he adhered to a statement which he had made to the police. If his statement had then been read out to him and he had said : " Yes, I agree with that ", that would have been evidence, not only against himself, but also against his co-defendants, and they would have had the right to cross-examine him about it.

On the authority of GRANT AND OTHERS (*supra*), it was clearly wrong for either Sharrock or Keast to be called to give evidence, and the question I have to decide is whether the mere fact that both of them were called into the witness-box and took the oath as witnesses can be said to amount to

“giving evidence”. In my view, it does. There is nothing to indicate whether the defendants in GRANT AND OTHERS (*supra*), who were called before the examining justices as witnesses for the prosecution, gave any evidence. Counsel for the prosecution in this case suggests that inferentially they must have done so, but I do not think it follows. In my opinion, the defendants Sharrock and Keast, having been put into the witness-box and sworn, were called to give evidence, and as I read the judgment of Birkett, J., in GRANT AND OTHERS (*supra*), that was wrong. The committal was, therefore, bad and the indictment must be quashed.

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Indictment quashed.

Solicitors: Graham Couch & Co., St. Austell; Rosen & Co., Bodmin; Stephens & Scowen, St. Austell, for the defendants; S. Townsend, Camelford, for the prosecution.

BEFORE

MR. JUSTICE HUMPHREYS. MR. JUSTICE ATKINSON
AND MR. JUSTICE OLIVER.

JAMES KESSACK NICHOLSON (No. 2).

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Dec. 15.

Sentence—Outstanding Offence Taken into Consideration—No Conviction in Respect of Outstanding Offence.

Opinion of the Court reiterated that where on the conviction of a prisoner an outstanding offence has been taken into consideration by the Court at his request, there is not a conviction in respect of the outstanding offence, and that the decision in McMINN (1945), 30 Cr. App. R. 188, that in such a case there is a conviction in respect of the outstanding offence sufficient to establish a plea of *autrefois convict* ought not to be followed.

Where an outstanding offence has been taken into consideration by a Court, the reason why it is undesirable that

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the person convicted should be tried again for it is that there would be a danger of his being twice punished for the same offence, and the practice is, therefore, not to proceed again in respect of an outstanding offence which has already been taken into consideration.

Application for leave to appeal against conviction.

The applicant was convicted at Devon Quarter Sessions on August 13, 1947, of larceny and was sentenced by the Chairman to two years' imprisonment. An application for leave to appeal against conviction was heard and refused on October 16, 1947 (see *ante* p. 98), but, owing to a misunderstanding for which he was in no way to blame, counsel who had been instructed to appear for the applicant was not present on that occasion, and the applicant was unrepresented. Subsequently counsel applied to the Court to order that the matter should be re-argued, and the Court ordered that it should be re-argued on the question whether *McMINN* (*supra*) was rightly decided.

P. F. Atkin, for the appellant:

The decision of Lewis, J., in *McMINN* (*supra*) was right in law, but Lewis, J., took a view too unfavourable to the appellant when he said, in the course of his summing-up, that the appellant had never been charged in respect of the outstanding offence. As the offence had been read out to the accused here in open court, and he had been asked whether he admitted his guilt in respect of it, he had, in view of the language of section 32 of the Criminal Justice Act, 1925, been charged with the offence. The appellant in the present case was in the same position. He had been charged with the offence, and admitted his guilt, and although the Court ultimately decided that they would not take the offence into consideration, sufficient had happened to entitle the appellant to rely on a plea of *autrefois convict*.

H. E. Park, for the Crown, was not called on to argue.

HUMPHREYS, J.: The appellant was convicted at Devon Quarter Sessions of larceny. He applies for leave to appeal

against that conviction, and his only ground of appeal is that the offence had already been included in a list of outstanding offences which he admitted at the Hitchin magistrates' court on July 22, and, as he contends, he had already been sentenced by the Hitchin magistrates partly on account of the very offence for which he was subsequently tried in Devon.

The practice of this Court, and indeed the universal practice of Judges long before this Court was instituted—a practice with which we most emphatically agree and of which we approve—is that if a person is shown to have been already punished in respect of a matter which is the subject of an indictment, the Court will not allow that indictment to be tried because it is not right that a person should be punished twice in respect of the very same matter. *Nemo pro eadem causa bis puniri debet*. That has nothing to do with this case, because when the appellant was before Devon Quarter Sessions, they ascertained that this offence had not been taken into consideration at Hitchin. The learned Chairman of Devon Quarter Sessions has informed this Court that he went into the matter and that it was proved before him that on the occasion of the trial at Hitchin the Chairman of the magistrates there announced that this offence was not being taken into consideration.

The learned Chairman of Devon Quarter Sessions, however, also reported to this Court that his attention had been drawn to *McMINN* (1945), 30 Cr. App. R. 138, and that he had distinguished that case from the present by reason of the fact that in that case the crime in question had been included in a list and had been taken into consideration on a previous occasion. In the present case the crime in question had not been taken into account, and therefore the decision in *McMINN* (*supra*) could not apply. The learned Chairman was quite right in his view.

This Court has already heard an application for leave to appeal in the present case on October 16. No counsel appeared for the applicant on that occasion. Singleton, J., gave the judgment of the Court dismissing the appeal (*ante*,

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p. 98) and in the course of the judgment he observed that McMINN'S CASE (*supra*) had been referred to by the learned Chairman, and continued (at p. 99): "It is all to the good that our attention has been drawn to McMINN (*supra*), for we are given to understand that the decision of Lewis, J., in that case has led to some difficulty, and it is not easy to see how it could ever be considered in this Court if it is universally followed in courts of trial." [He then referred to the facts of McMINN'S CASE (*supra*), and continued:] "We feel unable to agree with the opinion of the learned Judge. We recognise that the question has not been argued before us, but we think it right to point out that the taking into consideration of cases at the request of an accused person does not mean that there has been a conviction in each of such cases. For many years there has been a practice under which, when there are outstanding cases and the accused person has signed the usual form, those cases may be taken into consideration if after conviction the accused person admits them and wishes them to be taken into consideration." The learned Judge went on to say: "There is no conviction in respect of any of the outstanding cases, nor is there any separate sentence in respect of any of them. In the normal case no proceedings would follow upon any of them, for the reason that they had been taken into consideration, not because there had been convictions in respect of them."

After that judgment had been given, Mr. Atkin informed the Lord Chief Justice that he had been instructed to argue the application for leave to appeal, but that owing to a misunderstanding—for which counsel was in no way to blame—he had not been instructed on the occasion of the hearing on October 16. The Lord Chief Justice, with the approval, of course, of the other members of the Court, announced that the case would be put in a future list, and might be re-argued on the question whether McMINN'S CASE (*supra*) was rightly decided, and only on that question. To-day we have heard Mr. Atkin on that question. McMINN'S CASE (*supra*) was a decision to the effect that, where an outstanding offence is

taken into consideration, it should be regarded as a conviction in the sense that the accused person is entitled to base a plea of *autrefois convict* on it. Three Judges in this Court have already said through the mouth of Singleton, J., that in their opinion that is not the law and that the decision of Lewis, J., was wrong. After hearing the argument of Mr. Atkin, we have come to precisely the same conclusion, and in our opinion the judgment of Lewis, J., was not in accordance with the law. Where a list of outstanding offences has been taken into consideration by a Court, the reason why it is undesirable that the person convicted should be tried again for any one of those offences is that there would be a danger of his being twice punished for the same offence, and therefore the practice is not to proceed on any one of them. The person convicted is not, however, entitled to plead *autrefois convict* in respect of any of those offences. We recognise that what we have pronounced is a mere *obiter dictum*, because the matter does not arise in this case, as no outstanding offences were in fact taken into consideration.

It is unnecessary for us to say more than that this second hearing of the case will have the same result as the first, namely, that the appeal is still dismissed.

Appeal dismissed.

Solicitor: J. C. M. Dyke, Exeter, for the applicant.

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BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS
AND MR. JUSTICE SINGLETON.

ALFRED ROBERT GERARD.1948.
Jan. 19.

*Summing-up—Statement by Prisoner after Caution but before being Charged—“What I have to say I will say to the Court”—
Comment by Judge.*

The applicant was found, together with another man, in possession of a lorry laden with bottles of spirits. A police officer asked both men what they were doing with the lorry and thereupon both ran away in different directions. The applicant was caught and taken to the police station. There he was cautioned and asked by a police officer if he wished to say how he came into possession of the lorry and its contents. At the time the police officer had no knowledge that the contents were stolen, and no reference had been made to the question of the applicant being charged. The applicant replied: “What I have to say I will say to the Court”. At the trial the Judge in his summing-up commented to the effect that, if the applicant were innocent, it was somewhat curious that he had made that statement when he had not yet been charged.

Held, that the comment was perfectly proper and did not amount to a misdirection.

LECKEY, 29 Cr. App. R 128; [1944] K. B. 80, considered.

Application for leave to appeal against conviction and sentence.

The applicant was convicted at Middlesex Sessions on November 12, 1947, of housebreaking and larceny, another man, named Humphries, who was charged with him pleading guilty. The applicant was sentenced by the Deputy Chairman to three years' penal servitude.

At about 12.30 a.m. the attention of a police officer was attracted by the appearance of a lorry in which the applicant and his co-prisoner were travelling. The police officer was suspicious and pulled off the sheet which was used to protect the contents of the lorry, and he found that the load consisted

of a large number of cases of gin. He asked the two men: "What are you doing with this lorry?" Both men then jumped off the lorry and ran away in different directions, but later both were caught. Thinking it was a case which required investigation, the police officer took both men to the police station, and there, in accordance with the practice, they were formally cautioned. Neither was invited to make a statement. On the contrary, each was told that, unless he wished to make a statement about the matter, he need say nothing. The police officer said to the applicant: "Do you wish to say how you came into possession of the lorry and its contents?" The police officer did not at the time know that the contents of the lorry were stolen. The applicant replied: "I have nothing to say. What I have to say I will say to the Court". When the Deputy Chairman came to sum up the case, after referring to the general circumstances, he made this observation to the jury: "There is one other remark which was made and which you will have to consider. That was Gerard's statement, before he had ever been charged, that he was going to reserve his account for the Court. Of course, he is not bound to say anything, as you have been told, but it may occur to you to be perhaps a little curious with a man who has not yet been charged and who merely ran away because he lost his head, not knowing what was wrong, but guessing something was wrong with Humphries and not himself. It may be a little odd to you—I do not know—that he should say: 'I reserve my statement for the Court', when, in fact, he has not been charged with anything or told he is going to come before a Court".

Melville Buckland, for the applicant:

The Judge's comment on the statement made by the applicant after caution was an invitation to the jury to draw an inference adverse to the applicant by reason of that statement and amounted to a misdirection. That view has been taken by the Court of Criminal Appeal with regard to comments on statements made in similar circumstances in *NAYLOR*, 23

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Cr. App. R. 177; [1933] 1 K. B. 685, and *LECKEY*, 29 Cr. App. R. 128; [1944] K. B. 80.

The Crown was not represented.

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HUMPHREYS, J. [after stating the facts]: Counsel for the applicant has submitted to this Court that that comment was a misdirection. It could be a misdirection only if it was an invitation to the jury to form an adverse opinion against the applicant because he did not then give an explanation, but, in our opinion, it cannot possibly be construed as anything of the sort. It was a perfectly harmless, reasonable and true observation to make. The policeman did not know that the contents were stolen and the applicant said that he had not the least idea that they were stolen. Even if the policeman was going to make further inquiries, it is a little odd, one may think, that the applicant should have said, in effect: "I shall be taken before a Court and I will give my answer then".

Cases in which this Court is asked to quash a conviction on the ground of something being said to the jury by the presiding Judge in regard to what an accused man said on being charged are not infrequent. The matter was considered with great care by the Court in *NAVLOD*, 23 Cr. App. R. 177; [1933] 1 K. B. 685, and I do not think anyone would desire to quarrel in any shape or form with the judgment in that case, but *LECKEY*, 29 Cr. App. R. 128; [1944] K. B. 80, a later decision, has been cited to us. All we say about *LECKEY'S CASE* (*supra*), which was a decision of this Court, is that it may be described as forming the high water mark of those cases in which convictions have been quashed because of a statement made by the presiding Judge about an observation made by the accused man when he was arrested, and we are not disposed to extend the decision in that case beyond the facts of that case or some similar case, if it should come before us. The present is a totally different case, and is, we think, very much like *TUNE* (1944), 29 Cr. App. R. 162, which came before this Court after *LECKEY'S CASE* (*supra*). In that case, a man charged with fraudulent conversion, on being interviewed

by the police after caution with regard to the charges, made a statement in which he admitted that he had been shown various documents by the police, but gave no explanation and at the end said: "I can fully explain the whole question, but would prefer to have advice before doing so in writing". It was submitted that the Chairman in that case was wrong in commenting to the jury: "Could not that have been said without legal advice?" This Court held that there was nothing whatever improper in such an observation being made and declined to quash the conviction. Similarly, in the present case, in our view, what was said by the Deputy Chairman was a perfectly harmless and proper observation. It cannot have misled the jury into thinking that they ought to convict the applicant because he did not make some answer to the charge, when, in truth, no charge had been made against him at all. Therefore, this application for leave to appeal is refused. We do not think that the sentence is in the least degree excessive, and the application so far as the sentence is concerned is refused.

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Application refused.

Solicitor: James Fellowes, for applicant.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS
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1948.
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DOROTHY CLARA SOANES.

Plea—Guilty to Lesser Offence—Duty of Counsel for the Crown.

Where nothing appears on the depositions which can be said to reduce the offence charged in the indictment to some lesser offence for which a verdict may be returned, the duty of counsel for the Crown is to present the offence charged in the indictment.

Application for leave to appeal against conviction.

The applicant was charged at Hertfordshire Assizes before Singleton, J., on November 13, 1947, with the murder of her child, and was convicted of infanticide. She was sentenced to three years' penal servitude.

The applicant was twenty-five years of age, and had already had two illegitimate children. She had worked as a nurse at a home for blind babies. After a normal confinement, the applicant gave birth in hospital to the child which was the subject-matter of the indictment, and stayed there for twenty-four days, a longer time than patients normally stayed after childbirth. She appeared perfectly normal on discharge, and there was nothing to suggest that she was not in possession of all her faculties. A day or two after her discharge she killed the child by fracturing its skull in two places and then throwing it into a canal.

When the applicant had been given in charge of the jury on the charge of murder, her counsel informed the Judge that she was willing to plead guilty to infanticide, and counsel for the Crown expressed his willingness to accept that plea. Singleton, J., however, refused to allow it to be accepted on the ground that there was no indication in the depositions of

the circumstances which must exist before a verdict of infanticide can be returned, and the trial for murder proceeded.

No counsel appeared.

THE LORD CHIEF JUSTICE: The case was of a very grave character, and if the jury had returned a verdict of murder, it would not have been possible for this Court to substitute a verdict of infanticide. [His Lordship referred to the facts set out above, and continued:] It is impossible to say that the learned Judge was not fully justified in passing a substantial sentence on a woman who thus, with, apparently, no excuse, deliberately killed her child; in fact he was bound to do so. The jury, in the exercise of their undoubted prerogative, refused to find the applicant guilty of murder and returned a verdict of guilty of infanticide, although it is difficult to see on what evidence they could find that the balance of the applicant's mind was disturbed at the time as the result of her confinement.

The importance of the case is this. The learned Judge has expressed the hope that this Court may state their view on what happened here and what ought to happen in similar cases. When the applicant had been given in charge of the jury, her counsel informed the Judge that she was willing to plead guilty to infanticide and counsel for the Crown expressed his willingness to accept that plea. The Judge refused to allow that course to be adopted, and said that the charge was one of murder and that charge ought to be tried, although, of course, it would be for the jury to say whether the verdict should be guilty of murder or guilty of infanticide. The Judge's reason for refusing to allow a plea of guilty of infanticide to be accepted was that he could find no indication on the depositions that the circumstances existed which must exist before a verdict of infanticide, as distinct from one of murder, can be returned. While it is impossible to lay down a hard-and-fast rule in any class of case on when a plea for a lesser offence should be accepted by counsel for the Crown—and it

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must always be in the discretion of the Judge whether he will allow it to be accepted—in the opinion of the Court, where nothing appears on the depositions which can be said to reduce the crime from the more serious offence charged to some lesser offence for which a verdict may be returned, the duty of counsel for the Crown would be to present the offence charged in the indictment, leaving it as a matter for the jury, if they see fit in the exercise of their undoubted prerogative, to find a verdict of guilty of the lesser offence only. In this case we think that the learned Judge was not only right, but, indeed, bound, to insist on the applicant being tried for murder. There was nothing disclosed on the depositions which would have justified a reduction of the charge from murder to infanticide, and, accordingly, this application is refused.

Application refused.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS
AND MR. JUSTICE BIRKETT.

LEONARD RUDD.

1948.
March 1.

*Summing-up—Joint Trial—Evidence by One Prisoner on Oath—
Admissibility as Evidence against Co-Prisoner—Direction in
Special Circumstances.*

The recognised and universal principle of law that, whereas a statement made in the absence of the accused person by a co-defendant cannot be evidence against the accused person, yet if that co-defendant goes into the witness-box and gives evidence in the course of a joint trial, then his sworn evidence becomes evidence for all purposes in the case including that of being evidence against the accused person, has been in no way altered or detracted from by the decision in

MEREDITH AND OTHERS (1943), 29 Cr. App. R. 40. The head-note to that case correctly states a course which it may be desirable to adopt in directing the jury on a joint trial in certain cases, but does not purport to abrogate from the above-mentioned accepted principle.

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Application for leave to appeal against conviction and sentence.

The applicant was convicted at Birmingham City Quarter Sessions on November 29, 1947, of receiving stolen property and was sentenced by the Deputy Recorder to three years' penal servitude.

It is unnecessary to set out the facts of the case, beyond stating that a co-defendant of the applicant named Powell gave evidence implicating the applicant.

G. A. J. Smallwood, for the applicant :

The summing-up of the Deputy Chairman was unsatisfactory. He should have adopted the principle laid down in MEREDITH AND OTHERS (1943), 29 Cr. App. R. 40, and warned the jury that they ought not to regard the evidence of the applicant's co-defendant Powell as evidence against the applicant. Further, Powell was in the position of an accomplice and the jury should have been warned of the danger of accepting his evidence without corroboration.

No counsel appeared for the Crown.

HUMPHREYS, J. : The applicant was convicted at Birmingham City Quarter Sessions before the Deputy Recorder of receiving stolen property knowing it to have been stolen. It is quite unnecessary to deal with the facts of the case in any detail because it is admitted that there was ample evidence to go to the jury and the grounds of appeal do not challenge that fact.

We are asked to give leave to appeal against conviction on three grounds. The first, which was the ground suggested by the applicant himself in his original notice of appeal, was that

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the learned Judge in summing-up did not refer to the fact that a statement made by the applicant's co-defendant Powell in the absence of the applicant was not admissible against the applicant. To that objection there are two conclusive answers. The first is that the Deputy Recorder did refer to the matter, for he told the jury that a statement made by one prisoner in the absence of the other was not admissible against the other. The real gravamen of that attack on the summing-up is that the Deputy Recorder said this once only and did not repeat it. The second answer is that, inasmuch as Powell gave evidence on oath and repeated all that he said in his statement, it would not have made much difference if the learned Deputy Recorder had referred to the matter many times.

I turn now to the second ground, which is a further ground settled by counsel since the adjournment of this case a week ago. It is put in this way: "The learned Deputy Recorder never directed the jury that the sworn evidence of Powell should not be used in evidence against me in accordance with the decision of the Court of Criminal Appeal in *MEREDITH AND OTHERS* (1943), 29 Cr. App. R. 40, and failed to direct them at all as to how they should regard it". It is an astonishing thing for this Court to be told that a learned Judge was guilty of misdirection in failing to direct the jury that the sworn evidence given in the case was not evidence against one of the parties being tried. Ever since this Court was established it has been the invariable rule to state the law in the same way—that, while a statement made in the absence of the accused person by one of his co-defendants cannot be evidence against him, if a co-defendant goes into the witness-box and gives evidence in the course of a joint trial, then what he says becomes evidence for all the purposes of the case including the purpose of being evidence against his co-defendant. That is the law as we have always understood it, and there is ample authority to that effect, and most assuredly *MEREDITH AND OTHERS* (*supra*) said nothing to the contrary. In *MEREDITH AND OTHERS* (*supra*) there were several prisoners, and the Court

was dealing with the question whether the summing-up of the learned Recorder of London correctly directed the jury. The learned Recorder said, no doubt accurately, at the end of his summing-up, "These men all made statements, and it is impossible for you to listen to all those statements and not to realise that they are statements which may implicate some persons other than the men making them. You will do your best, members of the jury, to remember that those statements are only evidence against the persons who make them. I will go further than that. When the individual making a statement of that sort comes into the witness-box and gives evidence on oath, it is a different situation. What he says then does become evidence against the other person". He went on to say this: "but I endeavour in this class of case where there are a number of prisoners in the dock always to warn juries that so far as possible they should not use any evidence given by a person who is accused, when he is in the witness-box, against any one of his co-defendants". That obviously does not mean: "I am in the habit of directing juries that what a co-defendant has said is not admissible in evidence against another co-defendant", because the learned Recorder has just said to the jury: "what he has said does become evidence against the co-defendant". In our view, it is plain that what the learned Recorder was, in effect, saying to the jury was: "I always take care to warn juries of the danger of convicting solely upon the evidence of a co-defendant". That is good sense and, as the Lord Chief Justice (Lord Caldecote) observed in the judgment of the Court, a proper direction. The Lord Chief Justice, therefore, in that case, in giving the judgment of the Court dealing with the question of law, was clearly of the same opinion as all the other Judges in this Court have always been. When it is said that there was in that case, either by the learned Recorder in the first instance or by the Court of Criminal Appeal, a statement in law that a jury would be wrongly directed if they were told that they may take into consideration in considering the case of one defendant what has been said by a co-defendant, that is nonsense. We are

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satisfied that that was not the meaning of the learned Recorder or of the Lord Chief Justice when he used the expression (at p. 44): "that was a proper direction, and one that was fair to each of the appellants". I repeat that, in reading the judgment in *MEREDITH AND OTHERS* (*supra*) it must be remembered that what the Court was dealing with there was not a statement of law of universal application that evidence by a co-defendant in the witness-box is always admissible against another co-defendant. They were merely approving of the practice stated by the learned Recorder in that case as being perfectly fair to the then defendants, and for that reason the Court held that the direction was a perfectly proper one and that the appeal should be dismissed. That is the whole of that case, and it would be quite wrong to say that it is an authority for the proposition contended for by Mr. Smallwood; if it were, it would mean that the Court was intending to overrule or to differ from a whole series of cases, only one of which need be mentioned. Attached to the report of *MEREDITH AND OTHERS* (*supra*), there appears (at p. 46) a note of the decision of this Court in *GARLAND* (November 4, 1941). In giving the judgment of the Court, consisting of the Lord Chief Justice (Lord Caldecote), Lewis, J., and myself, I said: "The co-defendant of the appellant had given evidence before the jury on her own behalf, and what she said on that occasion was evidence for all purposes in the case and in that sense evidence against the appellant. . . . It is said that the learned Recorder [of London] omitted to remind the jury that in the position which she occupied in the case she ought to be treated as an accomplice, because her statement admitted to a great extent the case against her, and went on to state that she did what she did at the instance of the appellant. There is no doubt of the correctness of that proposition of law, and this Court will do nothing to weaken the force of those judgments in which it has been repeatedly said by this Court that it is most desirable that a Judge dealing with such a case, where it involves the evidence of an accomplice, should remind the jury of the danger of convicting upon the evidence of an

accomplice unless corroborated". We then went on to consider the facts of that case, and inasmuch as there was ample evidence of corroboration in that case, we dismissed the appeal. That disposes of the second of the objections.

The third ground which was probably intended to be raised by the words "he failed to direct them at all as to how they should regard the evidence" has been better put by Mr. Smallwood in his argument. He says that there should have been a direction with regard to corroboration of Powell, who was an accomplice. We agree that it would have been very much better if there had been such a direction. Indeed, we go so far as to say that there should have been a direction that Powell's evidence was in all probability that of an accomplice, and that if the jury took that view they ought not to act on it unless they found it to be corroborated. In fact there was no such direction, but, inasmuch as there was ample corroboration of the evidence of Powell both by other witnesses and by the admissions made in the witness-box by the applicant himself, we see no reason why we should not adopt the same course as we did in *GARLAND (supra)* and say that for that reason, whether it be called an application of the proviso to section 4 of the Criminal Appeal Act, 1907, or referred to in some other way, we shall refuse to interfere with the verdict of the jury, being satisfied that there has been no miscarriage of justice.

I am reminded that on p. 14 of the First Supplement to *Archbold's Criminal Pleading, etc.* (31st ed.), there is the following reference to *MEREDITH AND OTHERS (supra)*: "Where several prisoners are tried jointly, and one or more of them gives evidence on oath, it may in some cases be desirable that the jury should be directed that, although the evidence given by one prisoner does in those circumstances strictly become evidence against his co-prisoners, they should not regard it as such, but should use that evidence only for the purpose of considering whether that individual prisoner has given an explanation which may be true, or whether his evidence compels the jury to disbelieve him". When the matter is

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looked at in that light, we agree that there may be cases in which it is desirable that that course should be taken.

With regard to sentence, the Court is of opinion that the sentence of three years' penal servitude, having regard to all the matters which had to be taken into consideration, was rather heavy. We propose to reduce that sentence to one of eighteen months' imprisonment, and the time during which the applicant has been treated as an appellant will count towards his sentence.

*Application for leave to appeal against conviction refused.
Sentence reduced.*

Solicitors: Freeland & Passey, Birmingham, for applicant.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS
AND MR. JUSTICE BIRKETT.

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DONNAH LILIAN DOREEN ABERG.

Summing-up—Character of Prisoner—No Obligation on Judge to Refer to Good Character—Misprision of Felony—Future Charges—Observations.

Where a prisoner has a good character, there is no obligation on the Judge to refer to this in his summing-up.

BLISS-HILL (1918), 13 Cr. App. R. 125, referred to.

Observations on future charges of misprision of felony.

Application for leave to appeal against conviction and sentence.

The applicant was convicted at the Central Criminal Court on an indictment containing three counts. The first charged

her with having aided and abetted a person who was undergoing a sentence of penal servitude to be at large whilst such sentence remained in force and had not expired; the second with having received, comforted and assisted the same person, knowing that he was unlawfully at large; and the third with misprision of felony. She was sentenced by Cassels, J., on January 21, 1948, to concurrent terms of eighteen, eighteen and six months' imprisonment.

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In November, 1946 one Kostanda escaped from Wormwood Scrubbs Prison, and in the same month was brought to the applicant's house by a Pole, being subsequently introduced to her as a doctor. The applicant herself was a State registered nurse, and in the house which she occupied she carried on the business of supplying nurses. Kostanda came to live in a room in a semi-basement in the applicant's house, probably in March, 1947, and remained there till November, 1947. When the police visited the house in November, 1947, Kostanda got into a room on the first floor and concealed himself behind a curtain. When the police asked the applicant about him and informed her why they were looking for him, she gave them no information at all. The applicant gave evidence to the effect that she believed Kostanda to be a doctor.

L. Halpern, for the applicant:

It is conceded that there was evidence on which the jury were entitled to convict, but the substantial ground of complaint is that in his summing-up the Judge made no reference to the applicant's good character. In view of the decision in *BLISS-HILL* (1918), 13 Cr. App. R. 125, this must be regarded as a misdirection.

No counsel appeared for the Crown.

THE LORD CHIEF JUSTICE [after stating the facts]: Counsel had admitted that there was evidence on which the jury could come to the conclusion that the defendant was guilty. The real complaint is that the learned Judge, in a very long and detailed summing-up, which no one can read without seeing

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that on the whole it is favourable to the defendant in the sense that it stressed all the points in her favour and gave the jury an ample opportunity, if they saw fit, of accepting her version of the story and acquitting her, did not emphasise her good character. If it is said that it is misdirection on the part of a Judge, even where a defendant is represented by counsel, not to lay stress on the defendant's good character, I cannot agree, and I do not think *BLISS-HILL* (1918), 13 Cr. App. R. 125, is any authority to the contrary. That was a case in which the Judge did comment on the good character of the defendant, and it was said that he had not approached the matter in a proper way, but that it is a different thing from saying that in every case, if the Judge omits to refer to the good character of the defendant, that amounts to a misdirection and is a ground for quashing the conviction. In point of fact, there was no necessity to refer to the matter here, because the case was fought on the ground, and no one suggested the contrary, that the applicant was hitherto a woman of blameless character, who had been carrying on, for a long time and without any complaint, a business closely inspected by officers of the London County Council. There is no ground here for saying that there was any misdirection, and it being admitted that there was evidence to go to the jury, this Court cannot interfere.

There is one further point which has not been mentioned, but to which the Court thinks it desirable to refer. The third count was for misprision of felony, and the jury found the defendant guilty on that count as well as on the other two. As the sentence passed on that count was less than the concurrent sentences passed on the others, and as no point has been taken, it is not necessary for this Court to deal with the matter in detail. However, misprision of felony is an offence which is described in the books, but which has been generally regarded nowadays as obsolete or fallen into desuetude. Although it seems from a note in *Archbold's Criminal Pleading*, etc. (31st ed., p. 1446), that there have recently been cases at the Central Criminal Court in which

counts for misprision of felony have been included, I desire to say only this, that if in any subsequent case it should be thought necessary or desirable to include a count for misprision of felony, great care ought to be taken to consider what, at any rate according to more modern authorities, are the constituents of that offence. I call particular attention to the speech of Lord Westbury in *WILLIAMS v. BAYLEY* (1866), L. R. 1 H. L. 200, 220. It is unnecessary to say more than this, that if this offence is made the substance of any subsequent indictment or a count for this offence is included in any subsequent indictment, this Court may have carefully to consider what are or were the real constituents of the offence and whether it is necessary to prove a concealment for the benefit of the person charged.

The application fails and must be refused.

Application refused.

Solicitors: Wontner & Sons, for applicant.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS
AND MR. JUSTICE SINGLETON.

ELI ROWLEY.

Procedure—Plea—Accessory after the Fact—Pleas of Not Guilty by Alleged Principal Felons—Plea of Guilty by Accessory—Plea Accepted and Prisoner Sentenced Forthwith—Acquittal of Alleged Principal Felons—Conviction Quashed.

Where a prisoner is indicted jointly with the principal felon for being accessory after the fact to felony, it is wrong to accept a plea of Guilty from him before the issue of guilt of the alleged principal felon has been decided.

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Appeal against conviction (on certificate).

The appellant pleaded guilty at Birmingham City Quarter Sessions on January 13, 1948, to being accessory after the fact to receiving stolen property and was sentenced by the Assistant Recorder to nine months' imprisonment.

The appellant was charged in the first count of the indictment, together with two men named Stanley and Gall, with breaking and entering the warehouse of Marvelle, Ltd., and stealing ninety-three dresses and other property. In the second count they were all charged, alternatively, with receiving the property knowing it to have been stolen. To these counts all pleaded not guilty. In the fourth count the appellant was charged that he "well knowing that George Stanley and William Gall on the 6th day of December, 1947, in the City of Birmingham, had received ninety-three dresses, four blouses and one lady's sports suit, the property of Marvelle, Ltd., knowing the same to have been stolen, did on the same day and other days afterwards receive, comfort, harbour, assist and maintain the said George Stanley and William Gall". On the suggestion of counsel for the prosecution and the defence, neither of whom appeared in this appeal, the appellant's plea on that count was taken forthwith. The appellant pleaded guilty and the Assistant Recorder forthwith sentenced him to nine months' imprisonment. The trial of the other two prisoners then proceeded, and in the result they were both acquitted on all counts in the indictment. The Assistant Recorder took the view that, as the appellant had already been sentenced, he could not deal further with the matter, but gave a certificate for appeal.

R. A. L. Hillard, for the appellant :

The conviction should not be allowed to stand. The jury took the view that it was not proved that Stanley and Gall had committed any felony, and it would, therefore, be illogical to hold that in the circumstances the appellant could have been accessory to any felony committed by them. The confusion arose from allowing his plea to be taken before the issue of

the guilt of Stanley and Gall had been decided, and the proper course would have been not to arraign the appellant on that count until this issue had been decided.

R. H. Blundell, for the Crown:

It is conceded that the procedure adopted here was quite irregular.

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HUMPHREYS, J. [after stating the facts]: In the result there is an error on record which cannot be cured by amendment. Writs of error have been abolished since 1908 by the Criminal Appeal Act, but this Court has the power which the Court of King's Bench used to exercise in dealing with error on the record. Where there is no means of amending the record so as to make it consonant with the proved facts of the case and where the record is inconsistent with itself, as it is here, the only course which this Court can take is to quash the conviction. That must be done in this case.

This extremely unsatisfactory state of affairs arose from two mistakes at the trial. It should be stated in all fairness to the learned Assistant Recorder that he was no party to those mistakes except in the sense that, having stated what he thought was the proper course to adopt, he allowed himself to be over-persuaded by counsel on both sides and agreed to a course which has resulted in three persons being acquitted of a crime of which all three might—I do not say would—have been convicted if the proper course had been taken, because a very substantial case of receiving stolen property was presented against all three of them. The first mistake was this. It being a matter which had to be decided by the jury whether Stanley and Gall were or were not guilty of felony, it was quite wrong to allow the appellant to plead guilty to having done something in the shape of assisting and comforting those two persons well knowing that they had committed a felony. That was a matter which had to be tried, and if it had been tried and Stanley and Gall had been acquitted, the prosecution would have been bound to offer no evidence on this indictment against the appellant, on the ground that it would be absurd

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to say that he had assisted and comforted persons whom he knew had committed a felony when they had not in fact committed a felony. The Assistant Recorder did say more than once: "Had not I better wait for the other prisoners to be dealt with?", and he further pointed out, and this Court agrees with him, that, on the statement of the facts made to him, it appeared that the appellant had not assisted or comforted either of those persons at all. Therefore, even if they were guilty of the felony charged and he knew it, his conduct, while it might have amounted to a different offence, certainly did not amount to the offence of being an accessory after the fact. All that the appellant said was this: "Those stolen goods, I agree, were found in my van by the police, and when they were found, they asked me for an explanation and I lied to them. I said my van had been stolen and the stolen property must have been put into the van by the people who stole it. That was untrue, and I afterwards admitted that it was untrue and that I had lent my van to Stanley and Gall"—a totally different story. The proper course would have been for the three prisoners to be tried on the count for warehouse-breaking, if there was any evidence to support it, and in any event tried on the count for receiving, as to which there was ample evidence against all three. However, that was not done.

The next mistake was that, at the instance of counsel for the prosecution, the learned Assistant Recorder passed sentence then and there on the appellant without waiting for the jury to try the two alleged principal felons. The result was that the appellant was deprived of the opportunity which he would have had through his counsel of asking the learned Assistant Recorder to allow him to retract his plea of Guilty and to plead Not Guilty, in which case, as I have already said, the prosecution would have been bound to offer no evidence against him. But he could not do that, because he had been sentenced, and the learned Assistant Recorder took the view—we need not discuss whether he was right or wrong—that he had no power to deal with the matter any more and that it had passed

out of his hands. He therefore granted a certificate enabling the appellant to appeal to this Court.

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In the result not only were the two alleged principal felons acquitted—we must assume rightly—by the jury, but the appellant has been in custody since January 13 undergoing a sentence of nine months' imprisonment for an offence which he did not commit and never could have committed. It certainly is not a satisfactory state of affairs. We need not discuss what would have happened if he had been tried on the indictment as he should have been tried. It is quite clear that his plea was wrongly accepted.

It is to be hoped that the relation of the facts of this case will have the effect of preventing this sort of thing from occurring again. Where a prisoner is charged with the offence of being an accessory after the fact, which involves knowledge on his part that the person whom he has received and comforted had committed a felony, it is always improper to accept a plea of guilty from him until the issue has been tried by a jury, whether the other person has committed the felony or not, unless, of course, the other person pleads guilty to the felony. If the other person is awaiting trial, it is wrong to accept a plea of guilty from a prisoner who is indicted for an offence which involves his knowledge of the guilt of another person who is protesting his innocence and is about to be tried by a jury. The same observation would apply to a case of conspiracy.

The result, therefore, is that this appeal must be allowed and the conviction quashed.

Conviction quashed.

Solicitors: Philip Baker & Co., for appellant.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS
AND MR. JUSTICE SINGLETON.

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16, 22.

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Conspiracy—Indictment—Conspiracy to Contravene Orders for Control and Limitation of Manufacture and Supply—Three Different Stages of the Law—Three Different Conspiracies Charged in the Count—Convictions Quashed—Observations on Future Charges of Conspiracy.

The appellants were charged with conspiracy to contravene Regulation 55 of the Defence (General) Regulations, 1939. The particulars of offence alleged that between June 6, 1940 and January 21, 1946, they conspired together to contravene Orders made by the Board of Trade for the control and limitation of the manufacture and supply of toilet preparations by acquiring a quota to manufacture and supply toilet preparations in excess of that to which they were lawfully entitled, and by manufacturing and supplying toilet preparations in excess of any quantity to which they were so entitled. The first Order alleged to have been contravened was dated June 6, 1940. During 1940 and 1941 further Orders were made on the same subject-matter, without the law being substantially altered. A subsequent Order dated October 27, 1941, made substantial alterations in the law, and an Order dated August 23, 1943, made still further substantial alterations.

Held, that the indictment must be regarded as charging a conspiracy to contravene the law as to control which would be known to the conspirators, and which was the existing law, at the time when the conspiracy was formed. An agreement to disobey any future law which might be made with regard to the same subject-matter, and for the same object, could not amount to an indictable conspiracy.

Definition of conspiracy in *QUINN v. LEATHEM*, [1901] A. C. 495, at p. 528, and *MULCAHY* (1868), L. R. 3 H. L. 306, at p. 317 approved.

Although the Orders of October 27, 1941, and August 23, 1943, had the same general object as the Order of June 6,

1940, each of the later Orders made a substantial alteration in the nature of the offence which would be committed by a person disobeying the Order. Accordingly, a person who contravened the law with regard to control during the period covered by the indictment would be offending against each of the Orders in turn, and could not offend against all three at once, since they were not all in force at the same time. The indictment, therefore, must be regarded as charging three separate conspiracies in one count, and as bad on that ground.

Dicta of Tindal, C.J., in O'CONNELL (1844), 11 Cl. & Fin. 155, at p. 237 applied.

Per curiam: In an indictment for conspiracy each count should be so framed as to enable the jury to put their fingers on any specific part of the conspiracy in which they are satisfied that the particular defendant has been implicated, and to convict him of that offence only.

Per curiam: The growing tendency to charge accused persons with conspiracy to commit offences rather than with the specific offences which the evidence proves them to have committed ought not to be encouraged.

Appeals against conviction.

The appellants were convicted at the Central Criminal Court, on October 29, 1947, of conspiracy to contravene Regulation 55 of the Defence (General) Regulations, 1939, and were sentenced by Denning, J., West to 12 months' imprisonment and a fine of £500, Northcott and Weitzman each to three years' penal servitude and White to 12 months' imprisonment.

The particulars of offence alleged that between June 6, 1940, and January 21, 1946, they conspired together to contravene Orders made by the Board of Trade for the control and limitation of the manufacture and supply of toilet preparations in excess of that to which they were lawfully entitled and by manufacturing and supplying toilet preparations in excess of any quantity to which they were lawfully entitled. The Limitation of Supplies (Miscellaneous) Order, 1940 (S. R. & O., 1940, No. 874), dated June 6, 1940, required every person carrying on the business of supplying any class of controlled goods and every person buying to sell them again to apply to the Board of Trade to be registered in respect of that

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class of controlled goods in which he dealt. Paragraph 2 provided that, except under the authority of a licence granted by the Board of Trade, no registered person should supply during the material period a total quantity of that class of controlled goods exceeding the prescribed proportion of the supply made by him during the corresponding standard period. The Order expired on November 30, 1940, and another Order dated November 26, 1940, and other Orders up to October 27, 1941, were made on the same subject-matter, without any substantial change in the law. On October 27, 1941, the law was substantially altered by an Order (the Limitation of Supplies (Toilet Preparations) (No. 2) Order, 1941) requiring persons who were manufacturers of controlled articles to be registered in a special register, and paragraph 2 (1) created a new offence in that thereafter no person who was so registered was permitted to supply during the period of restriction any controlled goods in the manufacture of which he had carried on a process if the total quantity of such goods supplied by him during the period would thereby exceed his quota, which was based on the value of the total quantity of such controlled goods supplied by him during the standard period. Finally, by an Order dated August 23, 1943 (the Toilet Preparations (No. 3) Order, 1943), the whole system of control both as to manufacture and supply was altered, the quota control imposed by the previous Orders being replaced by a system of individual licensing for registered manufacturers, who, after September 1, 1943, might only manufacture, or supply toilet preparations of their own manufacture, under the authority of a licence granted by the Board of Trade. At no time, therefore, during the period of the six years covered by the indictment could a supplier, intent on contravening the law on this subject, offend against all the three Orders referred to together, since they were not all in force at the same time. At the close of the case for the prosecution it was submitted on behalf of the appellants that the case should not be left to the jury on the ground that one conspiracy as charged could not have existed in 1940, in that the conspiracy charged

amounted to an agreement to break laws which were not then in existence or even in contemplation, and that the case for the prosecution involved three separate conspiracies, and that as these had not been charged in separate counts but in one count, the indictment was bad. Denning, J., overruled the submission and the case proceeded.

J. D. Casswell, K.C., and B. Gillis, for the appellant, West.

L. L. Rose, for the appellant Northcott.

R. F. Levy, K.C., and J. F. F. Platts Mills, for the appellant Weitzman.

A. P. Marshall, K.C., and M. W. Sheldon, for the appellant White.

Anthony Hawke and R. E. Seaton, for the Crown :

The arguments on the material point appear from the judgment.

Cur. adv. vult.

March 22.—The judgment of the Court was read by HUMPHREYS, J.: The four appellants, together with one Westwater, who was acquitted by the jury, and David Weitzman, who was convicted by the jury but whose conviction was quashed by this Court on March 16 for the reasons then given, were indicted at the Central Criminal Court upon an indictment which contained one count charging them all with conspiracy between June 6, 1940, and January 21, 1946. They appealed to this Court upon various grounds but the view which the Court takes upon one point of law which was common to all the appeals renders it unnecessary to consider any of the other grounds. The trial was one which occupied twenty-five days and a very large number of documents were exhibited in the course of it, but the decision at which the Court has arrived renders it unnecessary to refer to any of the evidence contained in the seven volumes of transcript of the shorthand notes or to any of the exhibits put in at the trial.

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All the appellants in different ways and in varying degrees and at different times were connected with or interested in a company called the Newington Supply Company, Limited, which dealt in various goods including what came to be known as toilet preparations.

From a very early stage of the war it was found necessary to restrict the supply to the public of those amongst many other goods, and Orders with that object were from time to time made by the Board of Trade in pursuance of the powers vested in that Department by Regulation 55 of the Defence (General) Regulations. That Regulation empowers any competent authority to provide by Order for, *inter alia*, prohibiting the distribution, use and consumption of articles of any description, and by Regulation 92 (1) it is provided that if any person contravenes any such Order he shall be guilty of an offence against the Regulation under which the Order is made, while Regulation 90 provides, *inter alia*, that any person who conspires with any other person to commit an offence against any of the Regulations shall be guilty of an offence against that Regulation.

The nature of the charge sufficiently appears from the indictment, which alleges in the statement of offence a conspiracy to contravene Regulation 55 of the Defence (General) Regulations. The particulars of the offence as laid alleged that between June 6, 1940, and January 21, 1946, the accused persons conspired together to contravene Orders made by the Board of Trade for the control and limitation of the manufacture and supply of toilet preparations by acquiring a quota to manufacture and supply toilet preparations in excess of that to which they were lawfully entitled and by manufacturing and supplying toilet preparations in excess of any quota to which they were so entitled.

Early in the trial further particulars were, upon the direction of the trial Judge, Denning, J., furnished to the defendants. They are headed "Further particulars of overt acts" and are seven in number.

The particular Orders alleged to have been contravened are not mentioned in the indictment, but the case for the prosecution was that the first Order made was that known as Order 874 of 1940, dated June 6, 1940. That Order required every person carrying on the business of supplying any class of controlled goods to persons who buy for the purpose of selling them again (a description which would apply to the Newington Supply Company) to make an application to the Board of Trade to be registered in respect of that class of controlled goods in which they deal. Such an application was duly made by the company in respect, *inter alia*, of Class 16 in the Schedule to the Order, that is, perfumery and toilet preparations. The Order further provided in paragraph 2 that, except under the authority of a licence granted by the Board of Trade, no person who at any time during the period beginning with June 6, 1940, and ending with November 30, 1940, is a registered person, shall supply during that period a total quantity of that class of controlled goods exceeding in value two-thirds of the value of the total quantity of that class of controlled goods supplied by him during the period beginning with June 1, 1939, and ending with November 30, 1939, that period being known as the standard period. On the expiration of that Order on November 30, there came into force another Order dated November 26, 1940, and subsequently still further Orders were made during that year and the year 1941 up to October 27, 1941. Those Orders did not substantially alter the law. The two-thirds mentioned in the first Order was from time to time reduced and alterations in details were found necessary, but substantially the prohibition remained the same throughout that period, namely a prohibition against any person supplying controlled goods to an amount exceeding the prescribed proportion of the supply made by him during the corresponding standard period.

On October 27, 1941, the law was substantially altered by an Order specially dealing with toilet preparations known as the Limitation of Supplies (Toilet Preparations) (No. 2)

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Order, 1941. That Order required persons who were manufacturers of controlled goods to be registered in a register to be called "The Toilet Preparations Register" and created a new offence as follows. By paragraph 2 (1) no person who is registered is permitted to supply at any time during the period of restriction, namely, from November 1, 1941, to May 31, 1942. any controlled goods in the manufacture of which he has carried on a process if the total quantity of such goods supplied by him during the period would thereby exceed his quota which is put at fifteen per cent. of the value of the total quantity of such controlled goods supplied by him during the standard period. As a result of that Order that which had been unlawful, namely the supply of controlled goods to any extent by a person who is a mere supplier, that is to say, a wholesale trader and not a manufacturer, is rendered lawful if he can get the goods, but the manufacture of such goods is struck at by the prohibition upon the manufacturer from supplying goods which he has manufactured to more than the prescribed amount.

The company duly became entered upon this new register, and so far as it was a manufacturer was bound to comply with the terms of this new and different Order. Finally, by the Toilet Preparations (No. 3) Order, 1943, dated August 23, 1943. the whole system of control both as to manufacture and supply is altered, and the alteration cannot be better expressed than in the language of the explanatory notes attached to and forming part of the Order itself, which state: "Under this Order the quota control imposed by the previous Orders is replaced by a system of individual licensing for registered manufacturers, who, after September 1, 1943, may only manufacture, or supply toilet preparations of their own manufacture, under the authority of a licence granted by the Board of Trade".

Now a mere recital of those Orders makes it plain that a supplier intent on contravening the law on this subject from time to time over a period of six years covered by this indictment will of necessity offend against each of the three Orders

above referred to in turn. At no time could he be said to be offending against all three together, since they were not all in force at any one time. There was a formidable mass of evidence given by the prosecution tending to show that false returns signed by certain of the then accused persons were from time to time made to the Board of Trade on behalf of the company, and it was made clear that the case against the accused involved breaches by the company, in which the accused were alleged to be knowing participants, of all three Orders.

At the close of the case for the Crown, submissions were made by counsel on behalf of all the defendants strongly urging the learned Judge to stop the whole case and to rule that there was no case to go to the jury on the ground that there could not possibly be one conspiracy existing in 1940 which included an agreement to break the laws which did not exist at that date and were not even in the contemplation of the Government Department until later years, and that the case for the prosecution must involve three separate conspiracies, which ought, of course, to be charged in three separate counts. Mr. Hawke for the prosecution did not contest the proposition of law that if the evidence of necessity involved three separate conspiracies there ought to have been three separate counts, one dealing with each conspiracy, but he contended that the evidence showed that there was one conspiracy to defeat the law as to control and therefore to defeat all the Orders made with that object. The learned Judge in accordance with the practice did not deliver any reasoned judgment upon those submissions, but he overruled all the objections made and the case proceeded.

It should be stated here, though it is not the ground upon which this Court is proceeding, that the learned Judge directed that the indictment should be amended by deleting all the words from "by acquiring" to the end, and by substituting the words "by causing the Newington Supply Company, Ltd., to supply goods in excess of what it was lawfully entitled to supply". No application for leave to amend had been made

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by either side. The learned Judge was, in our opinion, entitled to exercise his discretion in directing the amendment, but he clearly should have invited the parties, and in particular the defence, to express their views upon the matter before deciding to do so. That opportunity was not given. In fact, the Crown did not desire any amendment and the defence would have strongly objected to the amendment if they had been given the opportunity of doing so. It was indeed made one of the grounds of appeal to this Court. The amendment made, however, did not affect the ground upon which this Court has decided that these convictions must be quashed.

In our opinion, the objection made by counsel upon the indictment was sound in law. The indictment must, in our view, be regarded as charging a conspiracy to do an unlawful act, that is, to contravene the law as to control. That means, in our opinion, the existing law, the law which would be known to the conspirators and which at the time when the conspiracy was formed and came into being was the law of the country. The definition of conspiracy to be found in the speech of Lord Brampton in the House of Lords in the case of *QUINN v. LEATHEM*, [1901] A. C. 495, at p. 528, is as follows: "A conspiracy consists of an unlawful combination of two or more persons to do that which is contrary to law, or to do that which is wrongful and harmful towards another person", and His Lordship continued by quoting with approval the language of Willes, J., in *MULCAHY* (1868), L. R. 3 H. L. 306, at p. 317, in delivering the unanimous opinion of himself and four other Judges whose opinion had been asked for by the House of Lords, "A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties promise against promise, *actus contra actum*, capable of being enforced, if lawful, punishable if for a criminal object or for the use of criminal means".

The argument of Mr. Hawke in this Court was to the effect that the indictment rightly charged a conspiracy to contravene the existing law, that is, the law as laid down in the Order of June 6, 1940, and further charged an indictable conspiracy by alleging an agreement to disobey any future law which might be made upon the same subject and with the same object. Apart from the fact that there was no evidence at all to substantiate such a charge, we hold that such an agreement as suggested by the learned counsel would not amount to an indictable conspiracy. At the most it would amount to an expression of intention to commit in the future, should occasion arise, any acts which might by then have become unlawful. That offends, in our view, against the precise words as well as the meaning of the definition of conspiracy to be found in *MULCAHY'S CASE* (*supra*).

Mr. Hawke also suggested that the law, to break which was the object of the alleged conspiracy, did not really change throughout the years since the law was always a law in some way or other restricting supplies of goods of that particular class. We are not saying that any mere alteration in detail in the language of the Order would result necessarily in a fresh agreement or conspiracy to break the law. For instance, when at the end of 1940 the two-thirds quota allowed by the Order of June 6 was reduced, it would not be right in our view to say that the law was substantially altered. Nor do we think that the law was altered when the Order of June 6, 1940, was replaced later in that year by an Order in substantially the same terms, but, as we have pointed out, the alteration made in the law by the Order of October 27, 1941, was a radical alteration of the nature of the offence which would be committed by a person disobeying the Order, and so also was the alteration made by the Order of August 23, 1943, although it is true to say that both of those Orders had the same object as the original Order of June 6, 1940. These were not merely alterations in detail, but they were changes in the law.

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It is for those reasons that we hold that the indictment in this case charged, and necessarily charged, three separate conspiracies rolled into one count, and it is elementary law that no more than one offence may be charged in any one count of an indictment.

Having arrived at that conclusion, we have had to consider carefully the effect of it upon these four convictions. Two observations fall to be made upon the facts of the case. Firstly, the case was of a nature bound to excite prejudice in the minds of a jury against the accused. Four brothers, whose family name indicated an alien origin, were alleged to have been concerned in a trading company which had failed in peace time but had prospered in war time, the prosperity being due as alleged to the creation of false documents and fictitious entries in books resulting in their obtaining permission to sell a far greater quantity of controlled goods than they were lawfully entitled to, to the prejudice of others trading in similar goods. Perhaps there never has been a case in which meticulous care was more clearly called for to ensure that the guilt of any person convicted should be brought home to him by clear evidence directed against himself and by that only. The second observation upon the facts of the case is that it appears to us probable in the case of Ellis White and to a lesser extent in the case of West, that they were in fact hampered in their defence and prejudiced by their inclusion in this vague and general form of charge extending over a period of years.

The real vice, however, of this form of indictment combining in one count what we hold to be three conspiracies is akin to that pointed out by Lord Chief Justice Tindal in giving the opinion of the Judges requested by the House of Lords in the case of *O'CONNELL AND OTHERS* (1844), 11 Cl. & Fin. 155, at p. 237. A count in an indictment for conspiracy charged several defendants with conspiring together to do several illegal acts. The jury found some of them guilty of conspiring with some of the defendants to do one of the acts, and guilty of conspiring with others of the defendants to do

another of the acts. The finding was held bad, the Lord Chief Justice observing that each count of conspiracy charges one unlawful agreement against all the defendants named in that count, and it was not competent for the jury to find as they had done; their verdict amounting to a finding of several conspiracies on a count which charges only one.

So in the present case each of the defendants was precluded by the form of the indictment from obtaining an acquittal upon such part, if any, of the three unlawful agreements as the prosecution had failed to establish against him. It is a matter of less importance, but it is worthy of note, that the presiding Judge in assessing the sentence is also deprived of the assistance to be derived from the verdict of a jury as to the quantum of blame to be attached in the opinion of the jury to each of several defendants.

Mr. Hawke stated that it was found impossible in this case to allocate to any particular period the supply in excess of the quota which it was desired to charge. That may have been a good reason for dropping that form of charge. The same difficulty may often arise where it is desired to prosecute a servant for embezzlement, but the remedy is not to allege a general deficiency in his accounts but to look for some other form of specific charge. If none can be found, that would be the best reason for saying that the servant, while short in his accounts, could not be proved to have stolen his master's money.

The most serious aspect of the present case was the creation of false documents brought into being and used for the purpose of deceiving the Board of Trade. The law of this country is not so futile that such conduct, if proved, cannot be criminally punished without recourse to a vaguely-worded general charge of conspiracy extending over six years. There is a growing tendency to charge persons with criminal conspiracy rather than with the specific offences which the evidence shows them to have committed. It is not to be encouraged. The stringent observations of Cockburn, C.J., in the case of *BOULTON AND OTHERS* (1871), 12 Cox 87, at p. 93,

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are in danger of being overlooked. But if the law of criminal conspiracy is to be invoked then each count of the indictment should be so framed as to enable the jury to put their fingers upon any specific part of the conspiracy as to which they are satisfied that the particular defendant is proved to have been implicated, and to convict him of that offence only. It is an essential feature of the criminal law that an accused person should be able to tell from the indictment the precise nature of the charge or charges against him so as to be in a position to put forward his defence and to direct his evidence to meet them.

All these convictions are quashed and the appellants are discharged.

Convictions quashed.

Solicitors: S. Coleman, for the appellant West; M. H. Shanson, for the appellant Weitzman; Thomas V. Edwards, for the appellant White.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS
AND MR. JUSTICE PRITCHARD.

THERESE FITZPATRICK.

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Customs Offences—Dealing with Uncustomed Goods—Onus of Proof—Proof not Shifted only where Goods Seized—Summing-up—Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), ss. 186, 259.

By the Customs Consolidation Act, 1876, s. 186, penalties are imposed on persons "who shall be . . . knowingly concerned in . . . in any manner dealing with goods", the import of which is prohibited or which are liable to duty,

"with intent to defraud" the Crown "of any duties due thereon, or to evade any prohibition" applicable to such goods. By section 259: "If in any prosecution in respect of any goods seized for non-payment of duties, or any other cause of forfeiture, or, for the recovery of any penalty or penalties under the Customs Acts, any dispute shall arise whether the duties . . . have been paid in respect of such goods, or whether the same have been lawfully imported . . . in every such case the proof thereof shall be on the defendant".

The shifting of the onus of proof under the last-mentioned section is not limited to cases where the goods have been seized. The "such goods" referred to in the section may be either goods seized for non-payment of duty, or goods in respect of which a penalty is sought but which have not been seized.

Appeal against conviction and sentence.

The appellant was charged, together with her husband and one Newton, who was acquitted, at Essex Quarter Sessions, on February 5, 1948, on an indictment which, in the first count, charged them with unlawfully dealing with uncustomed goods—namely, forty-six watches—between September 1, 1946, and April 9, 1947, contrary to section 186 of the Customs Consolidation Act, 1876, with intent to evade the prohibition applicable to those goods contained in an Order made by the Board of Trade under section 1 of the Import, Export and Customs Powers (Defence) Act, 1939. The second count charged them with unlawfully dealing with those watches with intent to defraud the Crown of duties on them, contrary to section 186 of the Act of 1876 and an order made by the Treasury under certain Acts relating to import duties. The third count charged dealing with those watches with intent to defraud the Crown of purchase tax. The appellant and her husband were convicted on all counts and the appellant was sentenced by the Chairman on each charge to two months' imprisonment, to run consecutively, and to a penalty of £138.

In April, 1947, Newton offered six Swiss watches for sale to another man, who proved to be a detective officer, telling him that duty had not been paid on them. The import of watches was prohibited except under licence. Those six

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watches were in due course seized by the Customs authorities. Later, two Customs officers twice visited the house where the appellant lived. A customs receipt was produced showing that duty had been paid on certain goods including three watches, and further customs receipts were produced by the appellant and her husband relating to fifteen watches in all. The appellant admitted that she had employed Newton to sell a number of watches but said that she had bought these in Petticoat Lane. She also admitted that on one occasion she had brought back eleven watches from Switzerland, but said she had paid duty on these. In consequence of statements alleged to have been made by the appellant with regard to watches, she was charged in respect of forty-six watches, of which six were those which had been seized. The Chairman directed the jury that the burden of proof was upon the appellant in respect of all forty-six watches.

A. P. Marshall, K.C., and Marston Garsia, for the appellant :

There was a substantial misdirection by the Chairman as to onus of proof. The jury should have been directed that under section 259 the onus shifted to the appellant only in respect of the six watches which had been seized. If this contention is correct, it is clear that all that the prosecution proved was that the appellant had dealt in prohibited goods, and there was no evidence that she did so with intent to avoid the prohibition or that when she dealt in them she knew that they were in the category of prohibited goods, as it was possible that they had been imported under licence, and there was no evidence that she knew that duty had not been paid. If the contention that the onus shifted with regard only to the six watches seized is correct, no part of the conviction ought to stand, for the jury may have accepted the appellant's explanation with regard to the small number of watches seized but rejected it with regard to the large total number. Further, the summing-up contained other misdirections.

Eric Neve, K.C., and V. Gerald Hines, for the Crown :

It is conceded that if the Chairman's direction was wrong and the onus shifted to the appellant only in respect of the six watches seized the conviction cannot stand. A grammatical analysis of section 259, however, which occurs in a group of five sections with a cross-heading "as to proof in proceedings", shows that the "such goods" therein referred to must include both goods seized and also goods in respect of which the recovery of penalty is sought. It is significant that the word "for" does not appear before the words "any other cause of forfeiture", and this implies that the section refers only to two and not to three classes of prosecution. The Chairman's direction on onus of proof was, therefore, perfectly correct in law.

A. P. Marshall, K.C., replied.

Cur adv. vult.

April 19.—The judgment of the Court was delivered by:

THE LORD CHIEF JUSTICE: An indictment was preferred at the Essex Epiphany Quarter Sessions against the appellant, her husband and one Newton containing three counts. The first charged them with unlawfully dealing with certain prohibited goods between September 1, 1946, and April 9, 1947, namely, forty-six watches, contrary to section 186 of the Customs Consolidation Act, 1876, with intent to evade the prohibition applicable to such goods contained in an Order made by the Board of Trade under section 1 of the Import, Export and Customs Powers (Defence) Act, 1939. The second count charged them with unlawfully dealing with certain uncustomed goods, namely, the same forty-six watches, with intent to defraud His Majesty of the duties thereon, contrary to the provisions of the same section and an Order made by the Treasury under certain Acts relating to import duties; and the third count charged them with dealing with the same goods on which purchase tax had not been paid with intent to defraud His Majesty of the tax, contrary to the appropriate statutory provisions relating to the tax and to the same section of the Customs Consolidation Act. Newton was acquitted by

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the jury, and the appellant and her husband were convicted. She appeals by leave of this Court against her conviction. The grounds submitted by Mr. Marshall on her behalf were that there was no evidence to go to the jury and that consequently the Court should have directed a verdict of not guilty at the close of the case for the prosecution; that there was misdirection in the summing up; and that her defence was not properly put to the jury. In the opinion of the Court the real and substantial question in the appeal is whether there was a misdirection as to the burden of proof.

The facts, so far as it is necessary to state them for the purpose of this appeal, are that in April, 1947, the accused man Newton offered some Swiss watches for sale to a man who proved to be a detective officer, telling him they had not paid duty. Watches are goods the importation of which is prohibited except under licence, as indeed at the material time were all goods except live animals. These six watches were in due course seized by the Customs. In consequence of this conversation with Newton, and a subsequent statement made by him, the matter was reported to the Customs authorities and two officers visited the house, where the appellant and her husband lived, on two occasions. On the first visit while the appellant was present at the interview she took no part in the conversation, though she did assist in a search to find a customs receipt which showed that duty had been paid on certain goods including three watches. Evidence was given by the officers that the practice at the ports was to allow persons arriving to bring in, on payment of duty, a few watches for personal or domestic use or as gifts, and it would necessarily follow that a person who was allowed to import a watch or watches with such permission and paid duty thereon could not by any possibility be said to be doing so with intent to avoid the prohibition. The second interview was with the appellant, who according to the evidence of the officer admitted that she had on one occasion brought in eleven watches after she had visited Switzerland and on which she said she had paid duty. She admitted that she had employed Newton to

sell watches and she put the number as not more than one hundred. But she alleged that she had bought these watches in Petticoat Lane, and that in saying, as she admitted she had, to prospective buyers that they had not paid duty she said it only to make people think they were getting them cheap. The customs receipts produced by the appellant and her husband related only to fifteen watches in all. When proceedings were taken against her she was charged along with the two other defendants in respect of forty-six watches; these were forty which Newton admitted having dealt in on behalf of the appellant or her husband and the six which had been seized by the Customs officers.

It is now necessary to refer to the relevant sections of the Customs Consolidation Act, 1876. Section 186, so far as is material for this case, imposes penalties on persons who shall be knowingly concerned in in any manner dealing with goods the import of which is prohibited or which are liable to duty with intent to defraud His Majesty of any duties due thereon or to evade any prohibition applicable to such goods. Section 259 is in these terms: "If in any prosecution in respect of any goods seized for non-payment of duties, or any other cause of forfeiture, or for the recovering any penalty or penalties under the Customs Acts, any dispute shall arise whether the duties of customs have been paid in respect of such goods, or whether the same have been lawfully imported or lawfully unshipped, or concerning the place from whence such goods were brought, then and in every such case the proof thereof shall be on the defendants in such prosecution, and where any such proceedings are had in the Exchequer Division of the High Court of Justice on the revenue side, the defendants shall be competent and compellable to give evidence".

Dealing first with the question whether there was any evidence to be left to the jury at the close of the case for the prosecution, there was evidence that the appellant had been dealing in Swiss watches. This appeared from her admission to the Customs officers. Swiss watches were prohibited goods and were liable to duty. Six watches had been seized. In

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the proceedings there was a dispute as to whether duty had been paid in respect of these goods and whether they had been lawfully imported. If, then, the onus of proving that the goods had been lawfully imported and that the duty had been paid was on the defendant, there clearly was a case to go to the jury in respect of six watches. Mr. Marshall, however, contends that the onus was on the defendants only in respect of those six, and as the learned Chairman directed the jury that the burden was on them in respect of all the forty-six, this was a misdirection which would invalidate the conviction. The Court agreed, as did the prosecution, that if the onus was put on the defendants only with regard to six and not in respect to all, the conviction could not stand. The proposition is that all the prosecution proved was that the appellant had dealt in prohibited goods; there was no evidence from which it could be inferred either that she did so with intent to avoid the prohibition or that she knew they were in this category when she dealt in them, for they might have been imported under licence, still less was there evidence that she knew duty had not been paid or indeed that duty had not been paid by someone. The question, therefore, is: on whom did the onus of proof lie? If the onus was shifted only with regard to six, though the greater includes the less, so that a verdict of guilty could pass in respect of part only of the watches included in the indictment, it is obvious that the jury might have accepted the defendant's explanation in respect of only six watches and rejected it, as they clearly did, with regard to forty-six. We have, therefore, to consider the true construction of section 259 and determine whether the onus is cast upon a defendant only, as Mr. Marshall contended, in respect of goods which have been seized.

Now in considering the grammatical construction of the section, it will be observed that the word "for" does not appear before the words "any other cause of forfeiture" in the second line. It seems, therefore, that the section is referring only to two and not three classes of prosecution, (1) in respect of any goods seized for non-payment of duty

or any other cause of forfeiture, and (2) for the recovering any penalty under the Customs Acts. The question then arises as to the meaning to be attached to the words "such goods" and "the same" in line five. Prosecutions under the Customs Acts must relate to some goods, for it is with goods that the Acts deal. "Such goods", therefore, may be either goods seized for non-payment of duty or other cause of forfeiture, or goods in respect of which the recovery of a penalty is sought, and which need not necessarily have been seized. That this was the intention of the legislature is confirmed by an examination of other sections in the Act dealing with forfeiture and penalties. By section 177 dutiable goods unshipped or removed from warehouse without the duty being paid or prohibited goods illegally imported are to be forfeited, and by section 178 goods the importation of which is restricted are when found or seized deemed to be goods liable to duty and unshipped without payment of duty. Section 207 deals with proceedings for the condemnation and forfeiture in the High Court. These sections, it will be seen, deal with remedies against the goods themselves and for those remedies to be effective it follows that the goods must have been seized. Section 186 imposes penalties on the person who does the acts prohibited by section 177 and extends the offences in respect of goods to harbouring and dealing with them. Section 218 is the first of a code of sections which, as the cross-heading shows, deal with the course of procedure for recovering penalties, enforcing forfeitures and punishing offenders under the Customs Acts, and section 259 is part of this code. The cross-heading relating to sections 259 to 263 is "as to proof in proceedings", which must refer not only to proceedings in regard to goods seized but also to those in which penalties are the object. The onus is put on the defendant when there is a dispute in the proceedings whether duty has been paid or whether the goods were lawfully imported. The obvious reason for this provision is that the facts must be within the knowledge and often within the exclusive knowledge of the defendant. If, for instance, it is found that

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he has dealt in prohibited goods, if he can show that he acquired them in the ordinary course of business obviously he would not be guilty of dealing in them with intent to avoid the prohibition. He can prove the positive, and unless he had to undertake the proof the Crown would generally have to undertake the proof of a negative. We can see no reason for saying that the proof is shifted only where the goods are seized which does not apply equally to goods not seized and which cannot therefore be condemned but in respect of which the defendant is liable to a penalty. In our opinion there was no misdirection, and the defendant was called on to establish her innocence not only as to the six watches seized but also in respect of the others.

Other criticisms of the summing up were made by Mr. Marshall; as usually happens in the course of a long summing-up some expressions were used which might perhaps have been put differently, but it is unnecessary to go through the passages attacked as in no case did they amount to misdirection which would invalidate the conviction. Accordingly, it must be taken that the jury rejected the defendant's explanation and the conviction must be affirmed.

[At the suggestion of the Court, counsel for the appellant applied for leave to appeal against sentence, and leave was granted.]

The Court considers in this case that they can say there is good reason for interfering with the sentences. There were three counts in the indictment, the first for importing prohibited goods, the second for not declaring them so that the duty was not paid and the third for evading purchase tax. As to the sentence on the third count the penalty will stand, but the Court thinks that on the whole a sentence of three months in all and two penalties would have been adequate. Therefore, they propose to reduce the sentence to one of one month on each count of the indictment to run consecutively, and they impose the monetary penalty on the second count and on the third count. This means that the appellant will have to pay two penalties instead of three and go to prison for three months

instead of six. The time during which she was in custody before the appeal will count.

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*Appeal against conviction dismissed.
Sentence reduced.*

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Solicitors: William Gorrings & Co., for the appellants; Solicitor for Customs and Excise, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS
AND MR. JUSTICE PRITCHARD.

JAMES WILLIAM NOWELL.

1948.
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Road Traffic—Driving under Influence of Drink—Examination by Police Doctor—Statement by Doctor that Examination Might be to Defendant's Advantage—Admissibility of Evidence of Examination—How Evidence of Police Doctor should be Regarded—Road Traffic Act, 1930 (20 & 21 Geo. 5, c. 43), s. 15.

The appellant, who was charged with driving a motor vehicle whilst under the influence of drink to such an extent as to render him incapable of having proper control of the vehicle, was examined by a police doctor in the following circumstances. The appellant had been given the opportunity of asking for a doctor to attend on his behalf, but had been unable to give the name of any doctor who would attend. When the police doctor desired to examine the appellant, the appellant displayed some reluctance, continued to sing, and behaved awkwardly. The doctor explained to the appellant that it might be in his own interest to allow the doctor to examine him, and the appellant eventually agreed to be examined, and was examined by the doctor, who certified that owing to his consumption of alcohol the appellant was unfit to drive a car.

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Held, that no kind of inducement had been held out by the doctor, nor had there been any conduct on his part, which rendered his evidence inadmissible.

Quære, whether if in such circumstances a doctor examined by force a man who throughout protested against the examination, the evidence of the doctor would be admissible.

Per curiam: Any suggestion which may arise from the judgment of the Scottish Court in *REID v. NIXON* and *DUMIGAN v. BROWN*, [1948] Sess. Notes 17, to the effect that a police surgeon or other doctor summoned by the police to conduct an examination is acting as the hand of the police and not as an independent medical referee is not to be accepted in England, and in England the evidence of any doctor, whether a police surgeon or not, should be accepted as the evidence of a professional man giving independent expert evidence with the sole desire of assisting the Court, unless the doctor himself shows that his evidence ought not to be accepted.

Appeal against conviction.

The appellant was convicted at Cambridgeshire Quarter Sessions on January 31, 1948, of driving a motor vehicle while under the influence of drink and of dangerous driving and was sentenced by the Chairman on the first charge to a fine of £50 and to be disqualified for driving for one year and on the second to a fine of £1.

The appellant was seen driving on the wrong side of the road and without lights, and on examination by police officers appeared to them to be under the influence of drink. He was taken by them to a police station, where the ordinary procedure was carried out. In accordance with an order circulated to police stations many years ago, a police doctor was sent for, who, on arrival, told the appellant that he could have his own doctor present, if he so desired. The appellant replied that he had never had a doctor in his life. On the police doctor stating that he wished to examine the appellant, the appellant at first refused to be examined, and kept on singing and behaving awkwardly. Eventually the doctor persuaded the appellant to submit himself to examination, saying that such examination might be to the appellant's advantage. He then subjected the appellant to certain tests, such as telling him

to walk on a chalk line and to touch his nose with his eyes shut. At the conclusion of the examination the doctor certified that the appellant was under the influence of drink to such an extent as to be incapable of having proper control of a motor vehicle. Subsequently the appellant gave the name of a doctor, Dr. Simpson, who later attended and examined the appellant. The appellant's defence at the trial was that he had been suffering from an excess of alkali and that his condition was attributable to alkaline, and not to alcoholic, poisoning.

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E. Garth Moore (*John MacGregor* with him), for the appellant :

The evidence of the police doctor should not have been admitted. A police doctor has no authority to examine an accused person against his will and if he persisted in doing so would be guilty of an assault. Here the appellant at first showed reluctance to be examined, and the doctor ought, therefore, not to have persisted in the examination. The matter does not rest there, because the doctor persuaded the appellant eventually by stating that it might be to his advantage to submit. This was an inducement held out by a person in authority, and invalidated all that followed on it. A police doctor, moreover, is in a different position from that of an ordinary medical man; there is authority in the Scottish Courts for the proposition that he is to be regarded as the "hand of the police": *REID v. NIXON* and *DUMIGAN v. BROWN*, [1948] Sess. Notes 17. Further, conversation between the appellant and his own doctor with regard to what the appellant had previously said to the police doctor was wrongfully admitted in evidence. The summing-up cannot be considered satisfactory with regard to either charge, and with regard to the charge of dangerous driving, there was a definite misdirection in that the Chairman told the jury that if the appellant drove the car dangerously, even though his conduct might be due to illness, he was guilty of an offence.

R. E. Seaton, for the Crown, was not called on to argue.

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HUMPHREYS, J.: The appellant was convicted at the Cambridgeshire Quarter Sessions of driving a motor car while under the influence of drink to such an extent as to make him unfit to drive a motor car. He was also convicted on the same facts and in relation to the same matter of the offence of dangerous driving under section 11 of the Road Traffic Act, 1930. On the first charge he was fined £50, and was disqualified for driving a motor car or holding a licence to drive a motor car for twelve months. On the second charge he was fined the nominal sum of £1. He now appeals against conviction on what are described as questions of law.

The first ground, and really the only ground which can be described as one of substance, relied on by Mr. Garth Moore, is this: The appellant was seen by police officers in a police car to drive his car along the road on the wrong side and without lights at night. Upon examination it appeared to the police officers that he was under the influence of drink, and they took him to the police station upon the charge of being, within the language of section 15 of the Road Traffic Act, under the influence of alcohol to such an extent as to make him unfit to drive the car.

At the police station the ordinary procedure was carried out, that is to say, the officer in charge of the police station was told what the charge was, and he then informed the appellant that a doctor would be sent for to examine him. That procedure is the result of a general order which many years ago was issued to police forces in England in order that there might thereafter be no complaint, as there frequently had been hitherto, that when a man was charged by a policeman with being drunk, and denied that he was drunk, the only other evidence was that of other policemen. It was said that one policeman was likely to back up the view of another policeman, and that the position was unfair to the person accused. Accordingly, an order was circulated that in every case where a man was charged with being drunk, either when driving a motor car or not, a doctor should, if possible, be sent for if the person charged was seriously contesting his

condition of alleged drunkenness. In this case, Dr. Brown attended and examined the appellant. The appellant was asked whether he would like to have a doctor on his own account. He was told more than once, as he did not seem to understand very well, that he could have a doctor and was asked whether he could give the name of a doctor who would attend on his account. His answers were certainly not very satisfactory, for he said that he had never had a doctor in his life. It now appears that he had been attended by the doctor who was eventually called. Then, without waiting for any other doctor, the police doctor who was called examined the appellant. The result of his examination was that he certified that the appellant was, owing to his consumption of alcohol, unfit to drive a motor car and the appellant was properly charged with that offence.

It is contended here that the evidence which that doctor gave was inadmissible on a ground which the Court finds it a little difficult to follow. It is said that the doctor committed a technical assault, the technical assault being that he felt the appellant's pulse, which may in law possibly be a technical assault but one which most doctors would take the risk of committing in the interest of the person who is being examined. Mr. Garth Moore does not rest his case on that ground, but says that the doctor went further than that, in that he asked the appellant several times to let him examine him, the appellant apparently not desiring to be examined at all. The doctor was a little persistent and explained to the appellant that it might be in his own interest that the doctor should be allowed to examine him, and after that the appellant agreed to be examined but, to use his own significant expression given in evidence at the trial, was very awkward about it. The evidence was that the appellant was singing in the police station and refused to stop, and the position cannot be put better than in his own words that he was behaving very awkwardly. The doctor thought that the appellant was not really in a condition to say whether he would be examined or not and that the appellant did not quite know what he was

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saying or doing at the time. Eventually, however, the appellant agreed to be examined and he was examined.

Mr. Garth Moore asks us to say that such conduct rendered the doctor's evidence inadmissible because he improperly examined a man who was refusing to be examined. We are not dealing with a case in which it is suggested that a doctor by force was able to examine a man who all the time was protesting against the examination or anything of that nature. When that case arises, we will deal with the question whether the evidence of such a medical man can be accepted or not. In this case the medical man behaved perfectly reasonably from beginning to end in the interests of the person whom he was examining, and the mere fact that he said at one time: "It may be better for you", or "It may be to your advantage that I should examine you", is nothing to the point when it is suggested that that was an improper inducement to do something, analogous to the kind of inducement which excludes confessions made as the result of persuasion, promises of threats. So much for that point.

The next point which was taken, not very strenuously, by Mr. Garth Moore was that some conversation between the appellant and his own doctor was given in evidence. Eventually the appellant did remember the name of a doctor who had attended him and gave his name as Dr. Simpson, and that doctor was sent for some considerable time after Dr. Brown had finished his examination. Dr. Simpson arrived and examined the appellant, and at the time had nothing to say about the matter except that he thought that the appellant was probably by that time in a condition to drive a motor car. In his evidence at the trial Dr. Simpson agreed that the symptoms which the appellant had displayed were those of a drunken man. He was asked this question: "Am I right in assuming that it was not until after you had had time to ruminate some days afterwards that you thought of alkalosis in connection with Mr. Nowell's case?", and the answer was "Correct". His evidence, therefore, comes to this, that, having at the time

thought of no explanation other than drink for the state in which the appellant was, he came to the conclusion some days afterwards that it might be the result of the appellant suffering from an excess of alkali which he had been taking. It is not surprising, perhaps, that the jury in those circumstances did not accept that doctor's evidence as any answer to the evidence of Dr. Brown. So far as the wrongful admission of evidence is concerned, the question that was overheard was: "Do you remember Dr. Simpson asking you what you had been doing and do you remember saying: 'Working very hard, and when I work hard I drink hard'?", and the answer was: "Yes". In our view, that is not inadmissible evidence at all.

There are allegations of misdirection by the learned Chairman on the first charge, but in our view there is nothing in any of them. There was here certainly no misdirection in law, and we think no misdirection even of fact.

The last point which is taken is that the learned Chairman in his summing up with regard to the charge of dangerous driving said this: "A word about the second charge. If you are reasonably satisfied that for whatever reason, whether he was ill or careless or under the influence of drink, this man was driving his car dangerously, then you will find him guilty under that head". Mr. Moore argued that that passage suggests that a man who does drive a car in a dangerous manner even though his driving is due to illness, is guilty of an offence. The answer is that he may or may not be. If the dangerous driving was due to a sudden attack of illness, nobody would suggest that the driver was committing a criminal offence in being unable for the moment to control his motor car; he would be suffering as the result of an act of God. But the learned Chairman went on to say: "If his evidence be true that he felt ill and knew he felt ill, and felt so ill that instead of going home he thought the best thing would be to go into a stackyard, you may take it that a man who knew he was in that condition ought not to be driving a car at all". In our view, there was no misdirection in that

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passage; it was a perfectly proper observation to make. The result is that this appeal fails and must be dismissed.

Perhaps I should have mentioned that we were referred to two Scottish cases heard together, judgment in which was given at one time, *REID v. NIXON* and *DUMIGAN v. BROWN*, [1948] Sess. Notes 17. It is not necessary to read the judgment of the Court which was given by the Lord Justice-General, who made a number of general observations with regard to the principles on which he suggested police officers and doctors should act in examining persons who are charged with such an offence as this. The Lord Advocate, according to the judgment of the Lord Justice-General, had stated that in all such cases the police surgeon or other doctor summoned by the police to conduct an examination was acting as the hand of the police and not as an independent medical referee. This Court can only say that it does not agree that that state of affairs, whether it exists in Scotland or not, exists in this country. Our view is that the evidence of a doctor, whether he be a police surgeon or anyone else, should be accepted, unless the doctor himself shows that it ought not to be, as the evidence of a professional man giving independent expert evidence with the sole desire of assisting the Court. One other passage in that judgment suggests that not only should the accused person be asked to consent before any medical examination of him takes place but that it should be made plain to him that the result may be used in evidence, but the case does not assist us in the judgment at which we have arrived, and it is not necessary to say more about it.

Appeal dismissed.

Solicitors: Waterhouse & Co., for Few & Kester, Cambridge, for the appellant; Vizard, Oldham, Crowder & Cash, for Wild & Hewitson, Cambridge, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS
AND MR. JUSTICE PRITCHARD.

ARTHUR BEAMON.

1948.
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*Sentence—Borstal Detention—Consecutive Sentences not to be
Passed—Prevention of Crime Act, 1908 (8 Edw. 7, c. 59),
s. 5 (1).*

Consecutive sentences of detention in a Borstal institution should not be passed.

Appeal against sentence.

The appellant pleaded guilty at Stoke-on-Trent Quarter Sessions on February 23, 1948, to three counts of an indictment charging him with housebreaking and larceny and shopbreaking and larceny and asked for fourteen similar offences to be taken into consideration, and was sentenced to three consecutive terms of detention in a Borstal institution.

H. J. Garrard, for the appellant.

No counsel appeared for the Crown:

THE LORD CHIEF JUSTICE: According to the appellant's record, when he was sixteen years old, before any of the seventeen offences with which the Recorder had to deal, the appellant had been before Courts on various occasions in respect of 102 offences. The Recorder confessed that he had the greatest difficulty in knowing what to do with the appellant, who had been a persistent absconder from schools to which he had been sent. Nobody had a good word to say for the boy.

This is one of those extremely difficult cases in which it is almost impossible to hope that the offender will reform, whatever course is taken. This is the first time that he has been sentenced to Borstal detention and the Recorder, regarding the case as a most serious one, passed consecutive sentences of Borstal detention on each count of the indictment. The

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Court does not find it necessary to pronounce definitely whether such consecutive sentences are bad in law, but has no doubt that they are undesirable because in effect they make the scheme of Borstal training unworkable. Section 5 (1) of the Prevention of Crime Act, 1908, provides: "Subject to regulations by the Secretary of State, the Prison Commissioners may at any time after the expiration of six months, or, in the case of a female, three months, from the commencement of the term of detention, if satisfied that there is a reasonable probability that the offender will abstain from crime and lead a useful and industrious life, by licence permit him to be discharged from the Borstal institution on condition that he be placed under the supervision or authority of any society or person named in the licence who may be willing to take charge of the case", and then follow provisions for the licence being revoked. That seems to show that at the end of six months the Prison Commissioners will have to take into account the possibility of the appellant being released on licence. Supposing they thought fit to keep him in Borstal detention for eighteen months and then to release him, what would become of the other sentences? In our opinion, it is obviously undesirable in the circumstances that the consecutive sentences should stand. If the Recorder came to the conclusion that the appellant was so hardened and intractable an offender that he was not likely to profit by instruction and discipline at Borstal and might have a very bad influence on others there, he could have sent him to prison, and it does not follow that this Court would have interfered. We express the opinion that it is not the right practice to pass consecutive sentences of Borstal detention, and in this case the sentences will be made concurrent and not consecutive. No doubt, the proper authorities, in considering at what Borstal institution the sentence is to be served, will take into account the appellant's past history and his apparent tendencies and abilities to escape.

Sentence reduced.

Solicitor: W. T. Beswick, Hanley, for the appellant.

BEFORE

MR. JUSTICE HUMPHREYS, MR. JUSTICE OLIVER
AND MR. JUSTICE BIRKETT.

MARY KINGSTON.

1948.
May 11.

Trial—Counsel Briefed for Prisoner's Defence—Failure of Counsel to Attend—Other Counsel Available—Prisoner Tried as Unrepresented Person—Conviction Quashed.

On the trial of the appellant, counsel who had briefed for her defence, owing to a misunderstanding, was not present in Court. Other members of the Bar were present and available. The Judge declined to postpone the trial or to accede to a suggestion made by counsel for the prosecution that one of the other counsel available should be asked to hold the brief of counsel who had been briefed for the defence, and the appellant was in the result tried as an unrepresented person. She did not cross-examine any of the witnesses for the prosecution, and though her rights were clearly explained to her by the Judge, did not go into the witness-box or make a statement from the dock or call any evidence.

Held, that the course adopted was tantamount to depriving the appellant of the right which she had to be defended by counsel, and the conviction must be quashed.

GALOS HIRED AND ANOTHER, [1944] A. C. 149, applied.

Per curiam: It was eminently desirable that the Judge should have asked one of the other counsel available to hold the brief of counsel who had briefed for the appellant and to undertake her defence.

Observations on the desirability of the Court being given power to order a new trial.

Appeal against conviction.

The appellant was convicted at Manchester Quarter Sessions on March 31, 1948, of receiving stolen goods and was sentenced by the Assistant-Recorder to six months' imprisonment.

When the case was called on for hearing at 10.30 a.m. counsel who had been briefed for the appellant was not present in Court, believing that the case would not be taken before 2 p.m. though there had been no application for a postponement or fixing of the case. Counsel for the prosecution

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informed the Assistant-Recorder of this, and asked whether he would be willing to postpone the case. The Assistant-Recorder said that the trial must proceed and that he would watch the appellant's interest. Counsel for the prosecution then informed the Assistant-Recorder that other counsel were present in Court and available, and suggested that one of them should be asked to hold the brief of counsel who had been briefed for the appellant and undertake her defence, but the Assistant-Recorder did not adopt this suggestion. The appellant was, accordingly, tried as an unrepresented person. She did not cross-examine any of the witnesses for the prosecution. At the close of the case for the prosecution the Assistant-Recorder clearly explained to the appellant her rights, but the appellant did not go into the witness-box or make any statement from the dock beyond saying: "I could say a lot, but I just cannot put it into words, so I cannot say anything", nor did she call any witness.

G. Abrahams, for the appellant:

The appellant was, as a result of the course adopted by the Assistant-Recorder, deprived of the services of her counsel. Admittedly counsel was at fault at not being present when the case was called on, owing to the mistaken belief, which appears to have been shared by a number of persons, that the case could not be reached before 2 p.m. The appellant ought not to be penalised for the fault of her counsel. Had counsel been present, several of the Crown witnesses would have been cross-examined, and the case strenuously fought, but the appellant was quite unable to conduct her own defence, and in the result the jury never heard her defence. In the circumstances the conviction was so unsatisfactory that it should not be allowed to stand.

W. Haycock, for the Crown:

It was entirely within the Assistant-Recorder's discretion whether he would assent to a postponement or not. It would certainly have been far more satisfactory if he had adopted the suggestion put forward on behalf of the Crown and asked

one of the other counsel available to undertake the appellant's defence; but the appellant was clearly told what her rights with regard to putting forward her defence were, and she made no effort to put forward any defence, though the issue was a very simple one. The summing-up put the matter quite fairly and clearly before the jury.

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HUMPHREYS, J. : This appellant was convicted at Manchester Quarter Sessions of receiving property knowing it to be stolen after a trial before the Assistant-Recorder, and was sentenced to six months' imprisonment. She now asks for leave to appeal against that conviction, and yesterday the Court heard argument by her counsel, Mr. Abrahams, why we should grant that application.

The case is quite an unusual one, and the grounds of appeal are quite unusual. No complaint is made that the trial was not properly conducted by the Assistant-Recorder. No question of the inadmissibility of evidence or of mistake in the summing up arises, but the complaint is that the appellant was, through no fault of her own, to use the expression used at the Bar, "deprived of the services of her counsel", her family having supplied a substantial sum of money to solicitors in order that they might brief counsel, and they having briefed counsel.

The case was a very simple one. There were very few witnesses, and the facts were in a nutshell. A roll of cloth was stolen by somebody. The appellant was seen in the street shortly afterwards carrying the cloth. She was seen to put it down in a place quite close to where it was afterwards found. The answer she made at the time was that she knew nothing about it, and that is the only answer she has ever made to this charge.

She was committed for trial and called upon to plead before the learned Recorder on March 31, when she pleaded Not Guilty. Owing to the amount of work at the sessions, there was a second Court sitting, presided over by the Assistant-Recorder, and her case was sent into that Court. The jury

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having been sworn, Mr. Haycock, who appeared for the prosecution, addressed the learned Assistant-Recorder: "In this case my learned friend Mr. Abrahams should appear for the defence and he is not here. I wonder if this case could be put back?" The Assistant-Recorder said: "I do not think it can. This is the only case at the moment we have to go on with. You prosecute, do you?" (Mr. Haycock): "Yes", and the Assistant-Recorder said: "The Court will naturally watch the interests of the accused. The trial will go on". The trial did go on. The case was opened and a witness was called and the appellant, who was in the circumstances unrepresented, was asked whether she wished to cross-examine. Her answer was: "No. I think it is very unfair. I have given Mr. Abrahams £30"—what she meant was that she had given to a solicitor £30 in order that he might brief Mr. Abrahams, and no doubt that is true—"and he cannot defend me. You heard learned counsel explain the position". The Assistant-Recorder made no observation in answer to that, but said: "Are there any questions which you want to ask this witness?", and the appellant said "No". The trial then proceeded and witness after witness was called, and in each case the appellant declined to cross-examine the witness. The only other incident which it is necessary to mention at the moment is that after one witness had given his evidence-in-chief the Assistant-Recorder said to the appellant: "It is quite obvious your counsel is not here. Who is your solicitor?", and the answer was: "Mr. Sandler". The Assistant-Recorder: "So far as you know, he is not here either?". The prisoner: "No, my family clubbed together and gave him £30 to defend me". The Assistant-Recorder: "Very well. You do not want to ask any further questions?", and she said: "No". The case for the prosecution was concluded, and then in perfectly clear and most fair terms the Assistant-Recorder explained to the appellant what her rights were in the matter, that she could go into the witness-box, or make a statement from where she was in the dock, whichever she preferred, and what would be the result of

either course that she might elect to follow, and that she was entitled to call witnesses. Nothing could have been fairer or more appropriate. The result was that the appellant, being asked: "Do you want to say anything, or what do you want to do?", said: "I could say a lot, but I just cannot put it into words, so I cannot say anything". Finally, the Assistant-Recorder said: "I want there to be no misunderstanding. You do not wish to say anything either from where you are or from the witness-box?", and she said: "No".

The result of those proceedings plainly is that the appellant has in fact been tried and convicted by a jury who heard the case and evidence for the prosecution but were never informed of the case or the evidence for the defence, if there was any defence. As to that, this Court is in the same position as the jury. We do not know whether there was any defence or whether there was not, but we have heard learned counsel, Mr. Abrahams, tell us that his client having already pleaded Not Guilty, he was going to fight the case on her behalf, and that there were certain things he was desirous of putting to the witnesses, and so forth. The case would, therefore, have proceeded in the ordinary way as a trial.

We have had a report in this case from the learned Recorder of Manchester, and it is quite clear from that report that the primary cause of this unfortunate situation was the failure of the counsel who had been briefed to do his duty to his client and the Court in attending when the case was in the list for trial. If he was unable for any good reason to attend, his duty, as everybody knows, was to see that some other member of the Bar held his brief and was in a position to represent the accused person. It was owing to the fact that that member of the Bar agreed with counsel for the prosecution that neither would go to the Court till 2 p.m. that all this trouble arose. In those circumstances, we think it right to say that in our opinion the Assistant-Recorder was perfectly justified in continuing with the trial of a person although she was unrepresented. The jury had to be considered. It would have been quite wrong for the

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Assistant-Recorder at 10.30 a.m. to waste the jury's time and tell them there was nothing for them to do and that they must come back at 2 p.m. for the convenience of counsel. No application had been made to the Court to fix the case for 2 p.m. or postpone it in any way.

If the matter rested on the facts which I have stated so far, this Court would not have interfered, but it appears from the shorthand note that when it was made plain that the appellant was not going to defend herself, was going to say nothing and do nothing, Mr. Haycock, who throughout acted perfectly properly and as a member of the Bar might be expected to act, said to the learned Assistant-Recorder: "I was just thinking, Mr. Recorder, that there are counsel available and they would hold the brief for Mr. Abrahams". He added: "I know you dislike it", and Mr. Haycock informed us that the meaning of that was: "I know you dislike the idea of trying as an unrepresented person a woman who has briefed counsel and paid money in order that counsel should represent her". We cannot help thinking that it would have been eminently desirable that the Assistant-Recorder should have accepted that invitation. There were members of the Bar present. No one who knows the Bar of England would doubt that one of them would willingly have accepted the duty of defending the appellant, and if she had refused the services of another member of the Bar because her own counsel was not present, we should have had no sympathy with her and certainly should not have interfered with the conviction. But, that suggestion being made, the Assistant-Recorder declined it. He said: "I am afraid I can do nothing about it, Mr. Haycock".

Now, it seems to us that that was tantamount to depriving the appellant of the right which she had of being defended by counsel. She had put herself, or her family had put her, in the position of a person who was entitled to the services of counsel. Money had been paid for that purpose by them, and she was entitled by the law of this country to the services

of counsel. The result of the whole matter is that, having briefed counsel, she has in fact been tried as an unrepresented person, there being other members of the Bar present, any of whom would have defended her if he had been asked, but of course could not come forward and offer to do so. The result is that the jury have never had any opportunity of knowing what was the defence to this case or hearing any cross-examination of the witnesses for the prosecution.

The case comes somewhat near a case which was tried in the Privy Council in 1944, *GALOS HIRED AND ANOTHER v. THE KING*, [1944] A. C. 149. The appeal came from the Somaliland Protectorate, and the headnote reads: "Where, pursuant to subsection 2 of section 3 of the Poor Persons Defence Ordinance, 1939, an advocate was assigned to the appellant 'for the preparation and conduct' of his appeal against his conviction of murder, and the advocate, through no default on his part, was unable to reach the court in time to conduct the appeal, which was conducted by the appellants in person and dismissed:—Held, that, the appeal had not been effectively heard and must be restored for hearing in circumstances which would enable an advocate to conduct it". The reason in that case why the advocate was unable to appear was because of the war; he had to go by ship from one place to another and there was no ship available. It was not his fault in the slightest degree, and apparently he was the only member of the Bar who was available at all in that particular part of His Majesty's Dominions. In the course of delivering the judgment of the Privy Council, Lord Maugham said as follows (at p. 155): "The importance of persons accused of a serious crime having the advantage of counsel to assist them before the courts cannot be doubted by anybody who remembers the long struggle which took place in this country and which ultimately resulted in such persons having the right to be represented by counsel: see Holdsworth, *History of English Law*, Vol. IX, pp. 226 *et seq.* This is a much stronger case. Just as a conviction following

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a trial cannot stand if there has been a refusal to hear the counsel for the accused, so, it seems to their Lordships, an appeal cannot stand where there has been a refusal to adjourn an appeal in which the appellant was entitled as of right to be heard by a counsel, assigned to him by the government, who was unable, without any default on his part, to reach the court in time to conduct the appeal". The appeal was then allowed, steps being directed to be taken to restore the appeal for hearing so that an advocate could attend.

If this Court had the power which this Court times out of number has stated that it ought to have, namely, that of ordering a new trial in the very, very few cases in which the Court would consider that a new trial was the appropriate remedy, there is no question that this case is one which would cry out for a new trial. The appellant could in that case be represented and justice could be done one way or the other, but we have no such power. I am not a prophet and I am not going to say what will be the law in future, but it is common knowledge that there has been in the Criminal Justice Bill which is now before Parliament a proposal that this Court should have that power. I can only say, as a member of this Court, I think with the approval of my brothers, that we all hope that such power will be given to this Court, and it is difficult to imagine a case which more urgently calls for such power being entrusted to the Court than the present one.

The circumstances of this case are such that we have two courses open to us. Either we must ignore all that happened at Manchester and say that there is nothing before us which would justify our quashing this conviction, or we must say that the whole matter is so unsatisfactory that we think the conviction ought not to stand. On the whole, we have come to the conclusion, though not without considerable hesitation, that the lesser of the two evils is to quash the conviction, because it is always better that a guilty person should escape conviction than that a possibly innocent person should be

convicted. For that reason, this appeal is allowed and this conviction is quashed.

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Conviction quashed.

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Solicitors : Sandler & Co., Manchester, for appellant.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE BIRKETT,
AND MR. JUSTICE STREATFEILD.

JOHN WILLIAM OSTER-RITTER.

1948.
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Summing-up—Misdirection in Law—No Substantial Miscarriage of Justice — Proviso Applied — Conviction Affirmed — Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), s. 4 (1).

Proviso to s. 4 (1) of the Criminal Appeal Act, 1907, applied and conviction affirmed in a case where there had been a clear misdirection in law in the summing-up.

Appeal against conviction.

The appellant was convicted at Essex Quarter Sessions on March 23, 1948, of obtaining goods by false pretences and was sentenced by the Chairman to three years' penal servitude.

The allegation was that on nine separate occasions the appellant had obtained goods by means of worthless cheques. The defence which he set up was that he had a reasonable expectation of money being paid into his banking account to meet the cheques. In his summing-up the Chairman said: "If there was a false pretence and a knowledge at the time the cheque was given that the funds were not there, on that being established the offence is complete, and it is no defence on

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the part of the defendant to say that he anticipated that at some future date his account would be replenished ”.

A. M. S. Neave, for the appellant :

The summing-up of the Chairman contained a clear misdirection in law. The jury were, in effect, told that the defence which the appellant had raised was no defence at all, and this must have led to a miscarriage of justice.

F. E. H. Gibbens, for the Crown :

It is conceded that the jury were misdirected on the law by the Chairman, but the Court is asked to consider whether this is not a case in which the proviso to section 4 (1) of the Criminal Appeal Act, 1907, should be applied. The evidence that the appellant had no reasonable expectation that funds would be paid into his bank sufficient to meet any of the cheques was overwhelming. All the witnesses who were called denied that there was any money owing by them to the appellant, or any likelihood of money being paid, in the one case where it was owed. In the circumstances no reasonable jury, even if properly directed, could have failed to convict the appellant.

THE LORD CHIEF JUSTICE : The appellant was convicted on an indictment charging him with nine separate offences of obtaining goods by worthless cheques. The evidence shows that the case was one of the most barefaced courses of swindling which it is possible to imagine. The appellant obtained at one time at least £600 worth of goods from different firms by means of worthless cheques, and as soon as he had given the firm the cheque he wrote asking them not to present it or to present it later, knowing that he had not a penny in the bank.

The defence which he set up at the trial was that he had a reasonable expectation of funds being paid into his account to meet the cheques. He had no expectation at all, for the persons whom he said owed him money were called and flatly denied that they owed him any money or that they had the

least intention of paying any money into his bank. The only witness who came anywhere near the appellant's suggestion was his brother, who was a partner in an extremely shaky firm of builders. He said that he owed the appellant £60, but that the appellant had no chance of getting it.

Unfortunately the learned Chairman did misstate the law. His summing-up contained this passage: "Now the defence really is this. What he said in effect was this: 'I knew I had not got the money in the bank at the time I gave the cheque, but I anticipated that—before the cheque was presented, I suppose—my account would be replenished either by a payment in by Mead, who owed me money, or by a payment in by C. E. Builders, who owed me money'" and, he might have added, "by a man named Phillips". The summing-up continued: "You may take this from me, again as a direction in law, that that is an entirely irrelevant circumstance. If there was a false pretence and a knowledge at the time the cheque was given that the funds were not there, on that being established the offence is complete, and it is no defence on the part of the defendant to say that he anticipated that at some future date his account would be replenished". In stating the proposition as widely as that, the learned Chairman was in error. If at the time when the appellant gave a cheque he had nothing but a hope that the money would be paid into his bank, even if it was a genuine hope, that would not be a defence; he must have had a reasonable expectation that the money would be paid in in time to meet the cheque. If a person gives a cheque for £10, knowing that he has no money in his bank to meet it, but believing, on reasonable grounds, that somebody is going to pay in £20 tomorrow, so that at the time when the cheque is presented it will be met, then he has not an intent to defraud. But in this case the evidence was overwhelming and as clear as it could possibly be that the appellant had no more expectation of the money being paid into his account than he had of being a millionaire the next day. It is impossible to believe that, even if the proper direction had been given to

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the jury, they could have come to any conclusion other than that the defendant was guilty of the offence which is commonly called passing worthless cheques.

In these circumstances, the case is obviously one in which the Court should apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907, which provides that, where the Court finds misdirection, they are not to quash the conviction unless they are of opinion that a substantial miscarriage of justice has been caused thereby. In this case we are quite satisfied that there was no miscarriage of justice. We are quite satisfied that the appellant was guilty of the offences charged, and there is no reason to suppose that, even if a proper direction had been given, the jury would have come to any conclusion other than that to which they did come. The appeal is dismissed.

Appeal dismissed.

Solicitors: A. Morgan, Chelmsford, for the Crown.

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